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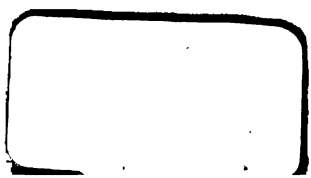

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CASES DECIDED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA

VOL. CXXII.

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT OF PUBLIC PRINTING.
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CASES DECIDED

IN THE

Supreme Court of Appeals

OF VIRGINIA.

Richmond.

BOWEN'S EXECUTOR AND OTHERS v. BOWEN AND OTHERS.

November 15, 1917.

1. APPEAL AND ERROR—*Omission of Bills of Exception from Record—Dismissal.*—A motion to dismiss a writ of error was based uopn the fact that the petition, when presented to the judge awarding the writ, was not accompanied by a complete transcript of the record, as by some inadvertence the bills of exception were omitted. Afterwards and before the motion was presented to the court, the plaintiffs in error applied to one of the judges of the Supreme Court of Appeals under section 3463, of the Code of 1904, for a writ of *certiorari*, requiring the clerk to transmit such portions of the record as had been theretofore omitted from the transcript. In response to this writ, the record was completed long before the motion was made, and was amply sufficient to present for the consideration of the court all of the errors which were assigned in the petition. The motion to dismiss the writ was therefore overruled.
2. EXPERT AND OPINION EVIDENCE—*Hypothetical Question—General Objection.*—Hypothetical questions propounded to expert alienists as to the testamentary capacity of the testator fairly embodied, in narrative form, the evidence relied upon by the opponents of the will to show the incapacity of the testator.

   Held: That general objections to the questions not specifying what particular parts of the questions or answers were objected to, if overruled, were of no avail on appeal.

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3. EXPERT AND OPINION EVIDENCE—*Hypothetical Questions.*—While it is perfectly well settled that a hypothetical question to an expert witness must embody all of the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion, it is not necessary that such question should embody all of the immaterial facts. If there be any facts or testimony omitted which the exceptant thinks are material, it is his duty to clearly indicate such defects to the court, and thereupon the court should require the propounder of the question to supply such omissions in the question as are material, so as to enable the expert to answer the question after being fully and definitely informed of all of such material facts.
4. APPEAL AND ERROR—*Question Raised for First Time on Appeal—Hypothetical Questions.*—Suggestions as to the insufficiency of the hypothetical questions which are made in the petition for writ of error and brief of counsel should have been made in the trial court, and it is too late to make such suggestions for the first time on appeal.
5. NEW TRIALS—*Motion to Set Aside Verdict as Contrary to the Law and Evidence.*—In considering a motion to set aside a verdict as contrary to the law and the evidence, the Supreme Court of Appeals is controlled by the demurrer to the evidence rule, section 3484 of the Code of 1904, and is prohibited from setting aside any verdict merely because of a serious conflict in the evidence. The motion cannot prevail unless the evidence upon which the verdict of the jury is based is clearly insufficient to support it.
6. WILLS—*Costs—Contest—Executor.*—Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate, his costs are taxed against the estate.
7. WILLS—*Costs—Contest—Beneficiary Under the Will.*—Where in the contest of a will it appeared that the beneficiary was the active litigant, seeking probate of the will, the contest being one between him as a beneficiary on the one hand, and the heirs at law of the decedent on the other, if the heirs at law prevail they may properly be awarded their costs against their adversary.

Error to a judgment of the Circuit Court of Albemarle county, declaring a will invalid.

Judgment affirmed.

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The opinion states the case.

Allen & Walsh and *E. O. McCue,* for the plaintiffs in error.

Gilmer & Gilmer, Chas. A. Hammer and *D. O. Dechert,* for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

A paper writing purporting to be the last will and testament of Lucius M. Bowen, deceased, in which he bequeathed and devised his entire estate to H. A. Sandridge, having been admitted to probate by the clerk of the court, one of the heirs at law, T. F. Bowen, appealed therefrom to the circuit court under section 2639-a of the Code. Upon such appeal the court made up the issue to be tried by the jury between the proponents of the will, Early and Sandridge, as complainants, and the contestants, the heirs at law of the decedent, as the defendants. On this issue the jury found that the will was invalid.

Before referring to the assignments of error, it is proper to dispose of a motion made by the defendants in error to dismiss the writ upon the ground that it was improvidently awarded. This motion is based upon the fact that the petition, when presented to the judge of this court by whom the writ of error was awarded, was not accompaned by a complete transcript of the record in the case. The record presented included the transcript of the evidence but through some inadvertence the bills of exception were omitted. It is contended that because of this omission the writ could not be lawfully allowed. Afterwards and before the motion was presented to the court, the plaintiffs in error applied to one of the judges of this court under section 3463 for a writ of *certiorari,* requiring the clerk to certify and trans-

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mit such portions of the record as had been theretofore omitted from the transcript. In response to his writ, the record was completed long before the motion was made, and is now amply sufficient to present for the consideration of the court all of the errors which are assigned in the petition. The motion to dismiss the writ is therefore overruled.

There are five assignments of error. Three of them may be considered together. These are the exceptions to certain hypothetical questions propounded to three physicians, two of whom are well known expert alienists, as to the testamentary capacity of the testator, and to the answers of these witnesses to such questions. The three questions are substantially similar, and each covers about fourteen pages of the printed record. They fairly embody, in narrative form, the evidence relied upon by the opponents of the will to show the incapacity of the testator. The exception in each instance is general, and there is no specification whatever as to what particular parts of such questions or answers are objected to. It would seem to be a sufficient answer to these exceptions to quote from section 18, volume I, Wigmore on Evidence: "The cardinal principle (no sooner repeated by courts than it is forgotten by counsel) is that a general objection, if overruled, cannot avail." *Bain* v. *Whitehaven & H. R. Co.*, 3 H. L. C. 1, 16; *Bundy* v. *Hyde*, 50 N. H. 116, 121; *Rush* v. *French*, 1 Ariz. 99, 123, 25 Pac. 816; *Sigafus* v. *Porter*, 84 Fed. 430, 435, 28 C. C. A. 443; *Warren* v. *Warren*, 93 Va. 74, 24 S. E. 913; *N. & W. Ry. Co.* v. *Ampey*, 93 Va. 125, 25 S. E. 226; *Lambert* v. *Jenkins*, 112 Va. 382, 71 S. E. 718; Ann. Cas. 1913-B, 778; *Norfolk, etc., Co.* v. *Norfolk*, 115 Va. 179, 78 S. E. 545, Ann. Cas. 1914-B, 1067; *Carpenter* v. *Smithey*, 118 Va. 544, 88 S. E. 321; *Camden* v. *Doramus*, 3 How. 515, 11 L. Ed. 705; *Burton* v. *Driggs*, 20 Wall. 125, 22 L. Ed. 299.

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In such cases much must be left to the discretion of the trial court, and it can hardly be doubted that if the criticisms made for the first time here in the briefs of counsel had been made in the trial court, it is probable that the question would have been to some extent changed.

In Jones on Evidence, section 371, this is stated: "The question is not necesarily to be rejected by the court although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute; and it is sufficient if the question fairly state such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory. It cannot be expected that the interrogatory will include the proofs or theory of the adversary, since that would require a party to assume the truth of that which he generally denies." Wigmore on Evidence, section 682, clause (c).

While it is perfectly well settled that a hypothetical question to an expert witness must embody all of the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion (*N. & W. Ry. Co.* v. *Spears*, 110 Va. 116, 65 S. E. 482; *City of Richmond* v. *Wood*, 109 Va. 75, 63 S. E. 449; *Lester* v. *Simpkins*, 117 Va. 68, 83 S. E. 1062), it is not necessary that such question should embody all of the immaterial facts. If there be any fact or testimony omitted which the exceptant thinks is material, it is his duty to clearly indicate such defects to the court, and thereupon the court should require the propounder of the question to supply such omissions in the questions as are material, so as to enable the expert to answer the question after being fully and definitely informed of all of such material facts.

The hypothetical question propounded in this case was carefully drawn to present the theory of the opponents of the will, and upon cross-examination, the proponents of the will asked each of these same witnesses questions which

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indicated their theory of the case, and the answers of the witnesses in each instance sustained the theory of the propounder of the question—that is, when the evidence tending to prove the testator's insanity or imbecility was narrated the witnesses expressed the opinion, if this evidence was true that he was insane, and when conflicting evidence tending to prove his sanity was narrated, they expressed the opinion, if this evidence was true, that he was sane. The jury had all of this conflicting evidence before it, which they must be presumed to have weighed and understood. In order to enable the expert to express an opinion which will be of value, such an interrogatory should embody all of the facts pertinent to the issue involved in the question, as to which there is no conflict in the evidence, together with the other evidence relied upon by the propounder of the question for the determination of such issue in his favor, as to which the testimony is conflicting. If regarded as material, the suggestions as to the insufficiency of the hypothetical questions which are made in the petition for writ of error and brief of counsel should have been made in the trial court, and it is too late to make such objections for the first time in this court.

3. Another assignment of error is, the overruling of the motion to set aside the verdict as contrary to the law and the evidence.

In considering this motion we are controlled by the demurrer to the evidence rule, section 3484 of the Code, and are prohibited from setting aside any verdict merely because of a serious conflict in the evidence. The motion cannot prevail unless the evidence upon which the verdict of the jury is based is clearly insufficient to support it. In this case the contrary is true. The testator had suffered from cystitis since 1908, which necessitated frequent catheterizations of his bladder, and finally died of Bright's disease in 1915 at the age of eighty-five. Without refer-

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ring to all of the evidence of the many witnesses who testified to circumstances indicating the testator's mental incapacity, it is sufficient to say that the evidence of the opponents of the will tended to prove that he was abnormal in his personal appearance, in his walk, in his conduct, and in his conversation; that his mother was feeble-minded; that one of his sisters and one of his first cousins had been adjudged insane; that his brother was an imbecile; that he had frequent inexplicable outbreaks of anger; that during the war between the States his father endeavored to keep him out of the army upon the ground that he was so deficient as to make him incapable as a soldier, though it also appears that he did serve several years and that his record as a soldier was good; that at times he had the delusion that he could communicate with his dead mother, sister and brother; that he had assumed to consult his dead brother upon important business transactions, and gave as one of the reasons for making the will disinheriting his near relatives that his mother, brother and sister, who at the time the will was executed had been many years dead, told him what to do with his property, whether before their deaths or afterwards is not entirely clear from the record; that his memory was so short and unreliable that he sometimes appeared to forget his near relatives, and sometimes failed to recognize them; that he would hide his money and forget where he had hidden it; that he sometimes did not recognize his own horses; that he was untidy, wore his shoes unlaced or tied with a hickory withe, and frequently wore no socks; that his farming operations were conducted with little intelligence; that his property had depreciated because of his continuous neglect of it; that a warrant charging him with lunacy had been issued but had been dismissed because the commission did not think it necessary to put him in an asylum, one of the doctors who served on that commission characterizing him in his testimony as a high grade imbecile;

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that on one occasion he did not recognize his own cattle; that on one occasion he delivered farming tools to his hands in the morning and when returned in the afternoon refused to receive them; that he claimed to hold conversations with his brother Jim, the imbecile who had been dead for many years; that he imagined he saw large balls of fire rise out of the garden and go up over the hills; that his conversation was disconnected; that once when riding horseback he carried grain or meal in a sack on his shoulder, instead of on the horse, giving as his reason therefor that it was easier for the horse to carry it this way; that he had carried eggs or produce to the store for sale or barter and left them there and forgot that he had done so; that on one occasion he rented his farm to an entire stranger, who turned out to be a tramp, receiving him into his house and putting him in charge of the farm, and when he learned the facts he repudiated the contract, was sued for damages, and having paid the judgment he from time to time thereafter went to the justice who tried the case and demanded of him the return of his money; that he once gave a permission to hunt on his land and within less than half an hour when the hunter had shot a squirrel, he ran up to him extremely angry and demanded to know who had given him permission to hunt on his land and ordered him to cease hunting and to leave his premises. There were other circumstances indicating imbecility and lack of testamentary capacity.

The jury having found that the paper propounded is not the last will and testament of the testator, and that verdict having been sanctioned by the judge of the trial court, the judgment will not be disturbed by this court.

4. Another assignment of error is to the judgment of the court requiring Sandridge, the claimant under the will, to pay the costs.

Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate,

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his costs are taxed against the estate. This case, however, presents peculiar features, and we cannot say that the court erred in this particular. Our statute, section 3545 of the Code, declares: "Except where it is otherwise provided, the party for whom final judgment is given in any action, whether he be plaintiff or defendant, shall recover his costs against the opposite party." In this case it appears that Sandridge was the active litigant, seeking probate of the will—the real plaintiff. The contest was one between him, as a beneficiary, on the one hand, and the heirs at law of the decedent on the other, and because the heirs prevailed in the court below they were properly awarded their costs against their adversary. If in this case the costs be paid by the estate, the effect will be not only that the heirs at law will not recover from their adversary, but that although they prevailed in the litigation they will have to pay the costs thereof.

In re Hendershott's Estate, 134 Iowa, 320, 111 N. W. 969, 120 Am. St. Rep. 438, a proceeding for the probate of a will, contested by the heirs at law of the decedent on the ground of testamentary incapacity and undue influence, probate was refused, and it was held that the costs were properly taxed against the unsuccessful party who claimed under the will, under a statutory provision "that costs shall be recovered by the successful against the losing party." *Dodd* v. *Anderson,* 197 N. Y. 466, 90 N. E. 1137, 27 L. R. A. (N. S.) 336, 18 Ann. Cas. 738, and cases there cited.

We find no reversible error, and the judgment is affirmed.

Affirmed.

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Syllabus.

Richmond.

GARDNER v. MOORE'S ADMINISTRATOR.

November 15, 1917.

1. GIFTS—*Effect—Requisites—Delivery.*—Title to personal property of all kinds may be passed by gift, and, when so passed, it is as irrevocable as if passed by purchase; but in order to possess this quality the gift must be complete. The thing given must be delivered, else the gift is incomplete. An agreement for future delivery is nothing more than a promise to make a gift. The delivery, however, may be actual, constructive or symbolical, depending upon the nature of the thing given. But there must be delivery of some kind, else there is no gift, unless it be by way of declaration of a trust.
2. GIFTS—*Delivery—Residence Together of Donor and Donee.*—Where an alleged gift by a mother to her daughter, with whom she resided, was not of money, but was a part of a judgment which the donor had recovered against her son—a mere chose in action—the provision of section 2414 of the Code of 1904, relating to the residence together of the donor and donee at their place of residence, has no application thereto.
3. ASSIGNMENTS—*Gifts—Negotiable Instruments Law.*—A mother gave to her daughter an order upon her attorneys in the following language: "Messrs. D. Wampler Earman & Swank, (attorneys at law), will please pay to Mrs. M. J. Gardner, or order, one thousand five hundred dollars and charge same to my account." The attorneys of the mother had previously recovered for her a judgment against her son for $2,700, which was all the property she owned then or thereafter until the date of her death. The judgment was not collected by the attorneys for the mother, but was paid in full to her administrator some time after her death, and an action was brought upon the order by the daughter against the administrator.

   Held: That the daughter could not recover against the administrator, as the writing in question did not operate either as a gift or an equitable assignment of a part of the judgment.
4. ASSIGNMENTS—*Negotiable Instruments Law—Assignment or Bill of Exchange.*—The instrument described in the preceding syllabus does not purport to be an assignment, and makes no mention of the judgment or other fund out of which it is to be

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paid. It measures up exactly to what section 126 of the negotiable instruments law declares to be bill of exchange, and which by the next section it declares, "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof." Code, section 2841-a, clauses 126, 127. The court cannot declare that to be a common law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the statute says it shall not so operate. The fact that the donor had no other estate than the judgment cannot affect the legal interpretation of the instrument of supposed donation. The same results would have followed if the donor had used an insufficiently executed will as the instrument of donation. As the instrument was not an assignment delivery of it was not a sufficient delivery to complete the gift.

Error to a judgment of the Circuit Court of Rockingham county, in a proceeding by motion for a judgment for money. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

John Paul, Ward Swank and *H. W. Bertram,* for the plaintiff in error.

D. O. Dechert, D. W. Earman and *Edward A. Martz,* for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is a proceeding by motion under section 3211 of the Code to recover a judgment for money. The notice and the writing upon which it is founded are as follows:

"To D. Wampler Earman,

"Administrator of Rhoda E. Moore, dec'd.:

"You are hereby notified that on the 28th day of Jan-

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uary, 1916, I shall move the circuit court of the county of Rockingham for a judgment against you for the sum of fifteen hundred dollars ($1,500.00) the same being due to me from you as evidenced by a certain order, a copy of which is filed herewith, for the sum of $1,500.00.

"Given under my hand this 12th day of January, 1916.

"MAGGIE H. GARDNER,

"By counsel.

"WARD SWANK,

"Of counsel.

"ORDER.

"Weyers Cave, Va., October 12, 1914.

"$1,500.00.

"Messrs. D. Wampler Earman & Swank (attorneys at law) will please pay to Mrs. M. J. Gardner, or order, one thousand five hundred dollars and charge same to my account.

her

"MRS. R. E. X MOORE.

mark

"Witness:

"G. B. GARDNER.

"Augusta county, to-wit:

"I, Jno. S. Hinegardner, a notary public, for the county aforesaid in the State of Virginia, do certify that Mrs. R. E. Moore, whose name is signed to the writing above, bearing date on October 12, 1914, has acknowledged the same before me in my county aforesaid.

"Given under my hand this 12th day of October, 1914.

"My commission expires January 9, 1916.

"JNO. S. HINEGARDNER, N. P."

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The parties waived a jury and submitted all matters of law and fact to the decision of the court, and the court entered judgment for the defendant, and to that judgment this writ of error was awarded.

Earman and Swank, as attorneys for Mrs. Moore, the drawer of the draft sued on, had recovered for her a judgment against her son for $2,700, on October 2, 1914, which was all the property she owned then or thereafter until the date of her death, on January 29, 1915. On October 12, 1914, the date of the draft, Mrs. Moore, the drawer thereof, was eighty years of age, of doubtful mental capacity, and resided with her daughter, Mrs. M. J. Gardner, the payee of the draft. The draft was presented to Earman, one of the drawees, shortly after it was drawn, but was never accepted or paid by him, nor was it ever presented to the other drawee. The judgment was never collected by the attorney for Mrs. Moore, but was paid in full to her administrator some time after her death.

It will be observed that the notice of the motion bases the plaintiff's claim for the recovery on the draft, or order, as it is called in the notice, and on nothing else. The notice states, "the same being due to me from you as evidenced by a certain order, a copy of which is filed herewith, for the sum of $1,500." It is conceded by counsel for the plaintiff in error that the death of Mrs. Moore, the drawer of the draft, revoked the "order itself," and also terminated the powers of the drawees as attorneys to collect the judgment, and if there can be any recovery at all in the case, it must be founded on some consideration other than the draft aforesaid. They seek to meet the situation by declaring that "the court and the parties to the action themselves treated the action as an action for money had and received" by the defendant to the use of the plaintiff, and thereunder undertook to establish a parol gift by an equitable assignment of a part of a particular fund. The pro-

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cedure by motion is very liberal, but, in the absence of consent, we do not wish to be understood as sanctioning such a departure as was indulged in the instant case, where the complaint was of the violation of a written contract, and evidence offered was of a parol gift. Dealing with the case, however, as it was dealt with in the trial court, as an action for money had and received to the plaintiff's use, we do not think that the plaintiff has proved the gift which she relies upon to establish her claim.

Undoubtedly, title to personal property of all kinds may be passed by gift, and, when so passed, it is as irrevocable as if passed by purchase; but in order to possess this quality the gift must be complete. The thing given must be delivered, else the gift is incomplete. An agreement for future delivery is nothing more than a promise to make a gift. The delivery, however, may be actual, constructive or symbolical, depending upon the nature of the thing given. But there must be delivery of some kind, else there is no gift, unless it be by way of declaration of a trust, which is not claimed in the instant case. Graves' Title to Personal Property, sections 18, 19, 20, 21, 23.

It is not claimed, in the instant case, that the gift was of money, but of a part of a judgment which the donor had recovered against her son—a mere chose in action—hence, the provision of section 2414 of the Code, relating to the residence together of the donor and donee at their place of residence, has no application thereto. *Bank* v. *Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898. It is claimed, however, that the draft in suit was an equitable assignment of a part of the judgment, and that the delivery of the draft to the intended donee was a sufficient delivery to complete the gift. We cannot concur in this view.

The instrument in suit bears no semblance of an assignment. It does not purport to be an assignment, and makes

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no mention of the judgment or other fund out of which it is to be paid. It measures up exactly to what section 126 of the negotiable instruments law declares to be a bill of exchange, and which by the next section it declares, "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof." Code, section 2841-a, cls. 126, 127. This court cannot declare that to be a common law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the statute says it shall not so operate. The fact that the donor had no other estate than the judgment cannot affect the legal interpretation of the instrument of supposed donation. The same results would have followed if the donor had used an insufficiently executed will as the instrument of donation.

A number of cases have been cited by counsel to show what amounts to an equitable assignment of a chose in action, and also to show what constitutes a sufficient constructive delivery to complete a gift, but as we deem the question here in issue settled by the statutes above mentioned, a review of such cases would not be profitable. There is no claim that any gift was made except by the draft, or that any assignment of any part of the judgment was attempted, unless the draft can be construed into such an attempt. It appears that the donor knew of the existence and amount of the judgment, and that it constituted her whole estate, and that she desired to give her daughter (the plaintiff) fifteen hundred dollars, because, as she expressed it, "I have stayed here with her and she has had more trouble with me than all the rest. When I was with the others then I was able to wait on myself, but since I have been here I have had to be waited on * * * I know I have been no little bit of trouble." She also stated that she wanted to give another daughter $500, and a third daughter $100, and drafts for these amounts were drawn in favor of those

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daughters—one of them on the same sheet of paper with the draft in suit. These are all the surrounding circumstances leading up to and attending the execution of the draft in suit. As said by the learned judge of the trial court, in his opinion made a part of the judgment, "These circumstances and much that was said by Mrs. Moore, which has been put in evidence, are strongly suggestive of a testamentary intent on the part of Mrs. Moore, rather than an irrevocable gift *in praesenti* effected by the signing of the orders and the disposition there made of them." The draft of "itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof," nor is there anything shown outside of the draft that can so operate.

The claim made by counsel for the plaintiff in error that the draft is supported by a valuable consideration, consisting of services rendered by the daughter to her mother, is inconsistent with the theory of a gift from the mother to her daughter, which has been the burden of the argument of her counsel in this court. The statements of the mother at and about the time the draft was drawn would seem to indicate a motive for a gift rather than the consideration for a contract. The gift, however, was not completed in her lifetime and was revoked by her death.

For these reasons, the judgment of the circuit court must be affirmed, but as the record discloses some evidence of a desire on the part of Mrs. Moore that the plaintiff should be compensated for services rendered her, this affirmance shall be without prejudice to the right of the plaintiff, if so advised, to assert against the defendant in error any claim she can properly establish to compensation for such services.

Affirmed.

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Richmond.

GATHRIGHT v. FULTON AND OTHERS.

November 15, 1917.

1. PARTNERSHIP—*Rescission—Rescission of Partnership Contract—Jurisdiction of Equity.*—A court of equity has jurisdiction to rescind and declare void *ab initio* a contract of partnership which has been procured by fraudulent representations. But the principles and the terms upon which equity will rescind a partnership contract for fraud are the same as those upon which other contracts may be rescinded for that cause.
2. FRAUD AND DECEIT—*Rescission—Contracts.*—Fraud does not render contracts and other transactions absolutely void but merely voidable, so that they may be either affirmed or repudiated by the party who has suffered the wrong. If he elects to repudiate and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position as though the transaction had not taken place and by doing equity to the defendant as well as to the plaintiff.
3. PARTNERSHIP — *Fraud and Deceit — Partner Obtaining Secret Profit—Remedy—Accounting on Dissolution—Case at Bar.*—Appellant secured an option to buy a tract of real estate for $30,000, which he attempted to sell appellees for $35,000. Appellees were unable or unwilling to buy the property alone, although it did not appear that they regarded the price as too high. Appellees, however, finally agreed to buy the property jointly with appellant for $34,000, each of the parties to own one-third of the property and bear one-third of the cost. Appellant represented to appellees that the option price was $34,000 and that it was the lowest price for which the property could be obtained, and that appellant had paid $1,000 to the owner of the property for the option. These representations were wholly untrue. Appellees learning of the false representations of appellant, and being otherwise dissatisfied with him, brought suit asking for a rescission of the partnership agreement and for the elimination of appellant from all connection with the ownership or management of the property. They did not ask to be restored to their former condition, but indicated plainly that they were averse to having the controversy disposed of by

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the usual process of restitution and the restoration of their former status. The case which they made out was one in which they have acquired in a partnership transaction interests in a property which they wish to keep, but in connection with the acquisition of which one of their partners took an unfair advantage and made a secret profit.

Held: That, appellees having unequivocally asserted the purpose of holding on to the fruits of their contract with appellant, they could not now, if they desired, be heard to ask for a recission *ab initio*, and a restitution from him; that, the only way to afford appellees relief for fraud of appellant is to dissolve the partnership; and, under the prayer for a settlement of accounts and for general relief, an account should be made up according to the usual and established method of settling a partnership on a dissolution, placing the first cost of the farm at $30,000, and denying appellant the $4,000 profit which he undertook to make off of his partners. The net assets after payment of the debts, if any, and the payment to each partner of what he is entitled to receive for his cash contribution to the enterprise, should be equally divided among the three partners.

4. PARTNERSHIP—*Dissolution—Disposition of Assets.*—Unless the parties agree upon a division in kind, the distribution of the assets between the partners upon dissolution should be made by selling all the partnership property, both real and personal, and dividing the net proceeds. For neither party has a right to compel a division of the specific subject in kind, or require the other to accept what, according to a valuation, his interest may be worth. Equity always directs the value of the subject to be ascertained in the way in which it can be best ascertained, by sale and conversion into money.

Appeal from a decree of the Corporation Court of the city of Staunton. Decree for complainants. Defendant appeals.

Reversed.

The opinion states the case.

J. M. Perry and *George A. Revercomb*, for the appellant.

H. H. Byrd and *Wm. M. McAllister*, for the appellees.

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KELLY, J., delivered the opinion of the court.

The essential facts in this case, established, not without some conflict of testimony, but as we conceive by the clear weight of the evidence, are as follows: T. M. Gathright procured from W. M. McAllister an option to purchase, at the price of $30,000, certain real estate known in the record as the "Fort Dinwiddie Farm." This option was dated June 6, 1912, and expired in thirty days from its date, but subsequently, on January 6, 1913, Gathright obtained from McAllister a second option upon the property at the same price. This second option was for a period of only nine days, and under it the purchase involved in this case was made. In the interim, however, between the expiration of the first and the execution of the second option, Gathright had verbal assurances from McAllister which led him to believe that if he could produce a purchaser McAllister would make the sale upon the terms named in the options.

It was not Gathright's purpose to acquire this farm as his own, but to sell it to some third party at an advance over the option price. To this end he brought the property to the attention of Dr. Z. M. K. Fulton and Dr. Edward S. Gifford, both of Philadelphia, pricing it to them at $35,000. They were attracted by the proposition, and it does not appear that they regarded this price as too high, but they were either unable or unwilling to undertake the purchase alone. After various unsuccessful efforts to interest other Philadelphia friends in the project with them, they entered into negotiations with Gathright looking to a joint purchase of the property with him, each of them to own one-third and each to bear one-third of the cost, including the necessary outlay to equip and operate the farm. During the course of these negotiations Gathright represented to Fulton and Gifford that McAllister's lowest price was $34,000; and he further represented to them that he had paid

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McAllister $500 for the original option and a like sum for the second option. These representations were wholly untrue. McAllister's price all the while had been $30,000, and Gathright had not paid him any sum whatever for either of the options.

On or about the 14th of January, 1913, the parties entered into a contract, which, so far as it need be quoted here, was as follows:

"This contract, made and entered into this 14th day of January, 1913, between T. M. Gathright, of the first part, and Z. M. K. Fulton and E. S. Gifford, of Philadelphia, of the second part, Witnesseth: That the said T. M. Gathright has contracted for the purchase from W. M. McAllister of his farm. * * * And the said T. M. Gathright hereby agrees and binds himself to sell to said Fulton and Gifford at the price of $34,000, and the said Fulton and Gifford hereby agree to purchase said farm from said Gathright and agree to pay the said purchase money in the following instalments: $9,000 to be paid in cash on the execution of this contract, $10,000 to be paid on or before the 15th day of February, 1913, and the residue of the purchase money, $15,000 to be paid in two equal instalments, payable in one and two years * * * and when the said $10,000 is paid, on or before the 15th of February, 1913, the said Gathright agrees to have the said McAllister to convey the said property to Fulton and Gifford by deed * * * in which deed Gathright and wife will unite for the purpose of conveying any interest they may have in same."

Gathright undoubtedly led Fulton and Gifford to believe, and they did believe, that the foregoing contract embodied the price and terms contained in the McAllister option.

Under date of January 15, 1913, Gathright wrote to Fulton and Gifford a letter, the substance of which appears from the following extract:

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"Referring to our sales contract of this date, and in order to set forth our respective interests, intentions, in agreement, I am writing this letter in triplicate with place for your signatures approving the same, which will constitute a contract between ourselves:

"In the sales contract to you I have this day signed, I acknowledge receipt in the same for $9,000 and am giving you separate receipts for $3,250 each, making $6,500, the difference of $2,500, being the amount of my payment on my interests that I am to have in this farm or in our company when we get our charter and organize.

"It being understood by and between us that I am to pay in one-third of the total purchase money and one-third of whatever additional amount that may be found necessary or advisable for the stocking and operation of the place. In other words, I am to pay in one-third of the capital stock that we may issue and each of you gentlemen to do likewise.

"It is understood between us that in the first payment I am not putting up my proportion, but that I am to make up this difference so that my payment will equal that of each of you by May the 15th, 1913, and that my payment on or before February the 15th, 1913, shall be not less than $3,333.33 in addition to what I have already paid.

"It is understood between us that when the $10,000 payment is made on or before February the 15th, 1913, by we three as above that the property shall be deeded to Z. M. K. Fulton and E. S. Gifford, and as soon thereafter as possible we are to organize and issue stock for the respective amounts that may have been paid in by us at that time you two are to make deed conveying this property to our company.

"The name of which shall be mutually agreed upon before that time, it being thought advisable by us now to incorporate under the name of 'Fort Dinwiddie' Farms."

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This letter was signed by Gathright and by Fulton and Gifford, and constitutes what is referred to in the record as the partnership agreement, the contract first above mentioned being known as the sales contract. While these contracts bear different dates, there can be no question at all about the fact that they are, and were intended by the parties to be, inseparably connected, and to be read together as evidencing the entire contract between them. It may be here added that the parties applied for and obtained a charter for the corporation proposed in the partnership contract, but the organization of the corporation thereunder was never completed.

The $2,500 mentioned in the partnership agreement as being the amount of Gathright's first payment on the purchase was not paid by him. According to previous written and verbal statements which he had made to his associates, this payment was to consist of $1,000 which he claimed to have previously paid to McAllister, and $1,500 cash which he claimed he was to pay at the time the option was closed. As a matter of fact, however, he had not, as we have seen, paid $1,000 or any sum to McAllister, and instead of paying $1,500 of his own money at the time the option was closed, he appropriated to his own use $1,500 of the $6,500 which his associates were putting up, and paid only the residue, $5,000, to McAllister, that sum, instead of $9,000, being the cash payment actually required under his option with McAllister. His partners had never seen the option.

On or about February 15, 1913, Fulton and Gifford and Gathright each paid to McAllister one-third of the $10,000 due on that day, and thereupon McAllister delivered to Z. M. K. Fulton a deed for the farm, taking Fulton's two notes for $7,500 each and reserving a lien upon the property. This deed did not disclose the true consideration, and it was not until some time later, after Fulton and Gifford had

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become dissatisfied with Gathright's conduct in connection with the management of the farm (a service which he was to render for the first year without compensation) that they instituted some inquiries which resulted in apprizing them of the deception he had practiced upon them in respect to the purchase money. The deed was made to Fulton alone, as a matter of convenience, and for the benefit of himself and Gifford and Gathright.

When the deed was delivered, Gathright was put in full charge and control of the farm as manager, and so remained until the fall of 1913, when the personal relations between him and Fulton and Gifford had become seriously strained, and he was practically discharged from the management.

After discovering the true state of facts as to the contract between Gathright and McAllister, Fulton and Gifford confronted him with a charge of bad faith. He inquired of them at that time whether, in case he should then make up the amount which they claimed he had fraudulently worked into the price of the place, they would be satisfied and would allow their relations to continue as theretofore, and they replied in the negative. They did, however, on that occasion, agree verbally to allow Gathright thirty days in which to sell the farm, exclusive of live stock and equipment, for $40,000, and it appears from the evidence that, if he had made the sale at that price, the net proceeds would have been equally divided among the three after the repayment to each of the actual cash advanced by him. Gathright did not produce the purchaser, and on September 30, 1913, Fulton and Gifford wrote Gathright as follows: "As the thirty days you asked for to sell Fort Dinwiddie Farm have expired and you have not made the sale, we hereby notify you that we have engaged Mr. W. M. McAllister as our attorney, with authority to terminate our business relations with you." It

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was at this time that Fulton and Gifford took possession of the farm and continued to operate and control the same through their own foreman until the receivers were appointed in this cause.

In June, 1914, Fulton and Gifford filed their bill against Gathright, charging him with false and fraudulent representations with reference to the productiveness of the farm, and particularly with reference to the contract price, and with infidelity and misconduct as manager. In this bill they charge also that he was acting as their agent and partner in closing the purchase from McAllister, and they pray that the court will require a full settlement of all transactions between them and Gathright; that the written partnership agreement be declared null and void because of the fraud in its procurement; and that the court "will grant a rescission of the said supposed partnership agreement, and a like rescission of said supposed contract of sale, and eliminate the said T. M. Gathright from all connection with the ownership or management of any of said property; that they be permitted to remain and continue in the operation and control of all the said affairs until the future order of the court; and that if the court deem it wise or proper to appoint a receiver to manage the affairs, that one be appointed by the court for that purpose." The bill also contained the usual prayer for general relief.

There was a demurrer to the bill, which was sustained with leave to amend; and also a demurrer to the bill as amended in accordance with such leave, the latter demurrer being overruled by the trial court. In the view which we take of the case, however, it will not be necessary for us to consider the demurrers and the assignments of error to the rulings thereon.

Gathright filed an answer in which he denied the allegations of fraud and undertook to defend the course which he had taken in withholding from them the true facts with

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reference to the consideration, claiming in the answer that he had the right to make a profit in the transaction, and that they were possessed of sufficient facts to charge them with notice that he was making a profit.

Before the suit of Fulton and Gifford against Gathright was matured for final hearing, Gathright, in October, 1914, filed his bill against Fulton and Gifford, setting out his version of the transaction and alleging that the complainants were improperly cutting timber on the farm, and in this bill he prayed for a partition of the farm and personal property, or for a sale thereof, if partition in kind could not be conveniently made, that proper accounts might be taken and for general relief. Fulton and Gifford answered this bill, setting out practically the same matters contained in their original bill against Gathright.

These two causes came on to be heard together on the 27th of January, 1916, when the court entered the decree which is the subject of this appeal. That decree rescinded the sales contract and the partnership contract, declaring the same null and void, decreeing that Fulton and Gifford should pay the receiver, who had theretofore been appointed to take charge of the farm pending the litigation, the sum of $3,333.33, with interest from February 17, 1913 (the exact date on which Gathright had paid that sum to McAllister), and $499.66 (on account of certain personal property which Gathright had purchased for the farm), with interest from October 15, 1913, and that "upon the payment of said sums, with accumulated interest, subject to the aforesaid $1,500 payment (the money of Fulton and Gifford which he had used) the entire interest of Gathright in the Fort Dinwiddie Farm and the personal and mixed property thereof shall cease and determine." The decree further directed the receiver theretofore appointed to pay the costs of the two causes out of the payments above mentioned, and to pay the residue to Gathright, and

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then to convey all the right, title and interest of Gathright in the property to Fulton and Gifford, share and share alike.

There is no question whatever about the jurisdiction of a court of equity to rescind and declare void *ab initio* a contract of partnership which has been procured by fraudulent representations. *Oteri* v. *Scalzo*, 145 U. S. 578, 12 Sup. Ct. 895, 36 L. Ed. 824, 827; Mechem's Elements of Partnership, section 251; Lindley on Partnership, 482; Story on Partnership (7th ed.), section 285; 3 Min. Inst. (2nd. ed.), p. 703.

But the principles and the terms upon which equity will rescind a partnership contract for fraud are the same as those upon which other contracts may be rescinded for that cause. In discussing the general subject of relief in equity against fraudulent transactions, Mr. Pomeroy, under the head of "Incidents of the Jurisdiction and Relief," says: "1. Fraud does not render contracts and other transactions absolutely void but merely voidable, so that they may be either affirmed or repudiated by the party who has suffered the wrong. 2. If he elects to repudiate and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position as though the transaction had not taken place and by doing equity to the defendant as well as to the plaintiff." 2 Pomeroy Eq. Jur. (2d ed.), section 915. See, also, to the same effect, *Wilson* v. *Hundley*, 96 Va. 96, 100, 30 S. E. 492, 70 Am. St. Rep. 837. The authorities supporting the jurisdiction of equity to declare partnership contracts void *ab initio*, do not go as far as we are asked to go in the instant case; indeed, they do not apply at all to the case we have here, as made by the pleadings and the proof. These authorities, on the contrary, contemplate cases in which the partner or partners complaining are seeking a restora-

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tion of their former status and asking to be eliminated entirely and *ab initio* from the transactions complained of. The complainants in this case not only failed to ask in their bill to be restored to their former condition, but they indicate plainly in their allegations, and they state still more plainly in their depositions, that they are averse to having the controversy disposed of by the usual process of restitution and the restoration of their former status. They state distinctly that they are unwilling to give up the property, even if Gathright should refund to them, with interest, every cent of money which they have invested in the partnership venture. It does not seem to us from their bill, especially when viewed in the light of their testimony, that they make out any other case than one in which they have acquired in a partnership transaction interests in a property which they wish to keep, but in connection with the acquisition of which one of their partners took an unfair advantage and made a secret profit. There is no serious claim that they were otherwise injured in the original transaction, and this deception is the sole ground upon which they are entitled to any relief. The charges as to misrepresentation of the productiveness of the farm go for naught in the face of their unwillingness to give up the property and get back the money which they have put into it. The allegations of improper conduct and mismanagement on the part of Gathright while he had charge of the farm, do not appear serious in the light of the evidence, and do not seem to be relied upon at this time; and if they were relied upon, they could not, of course, be made the basis of a decree for the cancellation of the original contracts, since they deal with matters arising subsequently.

The deception which Gathright practiced upon them with reference to the price is clearly established and cannot be defended in morals or in law; but the measure of the penalty which we can impose upon him, and the relief which

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we can afford to the complainants on account thereof, must be determined by the established equitable principles applicable to such cases. They claim to be justified in asking to turn him out of the partnership without allowing him any share in the property, on the ground that he did not have any interest in the property at the outset; but they themselves had no interest therein and no contract with McAllister, and the title interest which they at this time have in the property is due, as they clearly allege and prove, to his service and to his contract with McAllister. Whatever rights they have in the property they acquired through their association with him, and it is impossible, so far as he and they are concerned, to separate the sales contract and the partnership contract from their purchase of the land. They cannot claim under these contracts and against them at the same time. 2 Pom. Equity Jur., section 916, note 4, and cases cited.

Having unequivocally asserted the purpose of holding on to the fruits of their contracts with Gathright, they could not now, if they desired, be heard to ask for a rescission *ab initio*, and a restitution from him. They must accept the relief appropriate to the case which they have made.

The fraud which they have discovered and unmistakably fastened upon Gathright, and the resulting destruction of their confidence in him, entitle them to a termination of their partnership relations with him. 2 Lindley on Partnership, p. 580; 30 Cyc. 657, and authorities cited in note 19. The only feasible and the only just way to afford them this relief, in view of the position which they have assumed, is to dissolve the partnership. The bill filed by them, as well as the bill filed by Gathright, contains a prayer for a settlement of accounts and for general relief. The parties have all invoked the aid of equity in the settlement of their differences, and while neither of them can be accorded the

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special relief for which they pray, the court ought to and will enter the decree shown to be proper upon the whole case, and thus promote the sound policy of reaching as promptly as justice will permit the end of the countroversy.

The decree complained of will be reversed, and this court will enter a decree dissolving the partnership and remanding the cause to the corporation court for a settlement. The account should be made up according to the usual and established method of settling a partnership on a dissolution placing the first cost of the farm at $30,000, and denying Gathright the $4,000 profit which he undertook to make off of his partners. The net assets after payment of the debts, if any, and the payment to each partner of what he is entitled to receive for his cash contribution to the enterprise, should be equally divided among the three partners. This distribution, unless the parties agree upon a division in kind, should be made by selling all the partnership property, both real and personal, and dividing the net proceeds. "For neither party has a right to compel a division of the specific subject in kind, or require the other to accept what, according to a valuation, his interest may be worth. How (on Partnership) 257. Equity always directs the value of the subject to be ascertained in the way in which it can be best ascertained, by sale and conversion into money." *Pierce* v. *Trigg*, 10 Leigh (37 Va.) 423, 440; Story on Partnership (7th ed.), p. 542, section 350; Ludley on Partnership, p. 555; Bispham's Eq. (6th ed.), section 514.

In the meantime, the receivership heretofore decreed in the cause, should be continued under the direction of the corporation court, until the property is disposed of by mutual agreement or by sale as above indicated.

Reversed.

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Richmond.

GOOD v. GOOD.

November 15, 1917.

1. DIVORCE — *Desertion — Sufficiency of Evidence.*—In a suit for divorce from bed and board on the ground of desertion, the divorce should be granted where the unimpeached and uncontroverted evidence showed that the defendant abandoned his wife without sufficient cause, telling her "that he was going away and did not want to have anything more to do with her, and would not ask her to live with him again;" and, that the only reason assigned by him for deserting his wife was that she had contracted an account in the neighborhood for food and clothing. It also appeared that, although defendant lived in the same county with plaintiff until a short time before the taking of the depositions in the case, he made no effort to communicate with her by word or letter; that he was personally served with process in the suit, but neither appeared nor answered the bill, nor introduced any evidence in his own behalf.

Appeal from a decree of the Circuit Court of Rockingham county, dismissing complainant's bill for a divorce.

Reversed.

The opinion states the case.

Charles A. Hammer, for the appellant.

No appearance for the appellee.

WHITTLE, P., delivered the opinion of the court.

This is a suit by the appellant against the appellee for a divorce from bed and board, for the wilful desertion of the wife by the husband for a less period of time than three years. The circuit court was of opinion that the charge of desertion was not sustained; and that the evi-

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dence indicated that the appellee left with the consent and approval of appellant and her father and mother, if not under actual compulsion.

We cannot concur in this view of the evidence. To the contrary, we think the charge of wilful desertion is fully proved by the uncontradicted testimony of Arabella Good, the wife, and that of C. H. Baugher and Alice Baugher, her father and mother. The defendant, so far as the record shows, abandoned his wife, without sufficient cause, on August 17, 1915, and this suit was not brought until May, 1917. He departed, taking with him his clothing, and telling his wife that he was going away and did not want to have anything more to do with her, and would not ask her to live with him again. The only reason he assigned for deserting his wife was that she had contracted an account in the neighborhood for food and clothing. "He got angry about her making that account, and said she bought things she did not need." He refused to pay the account, which was subsequently paid by Mrs. Baugher.

Defendant lived in the same county with the plaintiff until within a short time before the taking of the depositions in the case, but made no effort to communicate with his wife by word or letter, and has since removed to another county. He was personally served with process in the suit, but neither appeared nor answered the bill, nor did he introduce any evidence in his own behalf. In this state of the case we do not feel at liberty to ignore the uncontroverted and unimpeached testimony of these witversed, and this court will enter such decree as the circuit desertion.

For these reasons, the decree complained of must be reversed, and this court will enter such decree as the circuit court ought to have made granting the appellant, Arabella Good, a divorce from bed and board of her husband, John P. Good, on the ground of desertion for less than three years.

Reversed.

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Syllabus.

Richmond.

GUM V. GUM.

November 15, 1917.

1. JUDGMENTS AND DECREES—*Conclusiveness of Judgment—Collateral Attack—Judgment in Divorce Suit as to Property Rights of Parties.*—A decree in a suit for divorce in favor of a husband against his wife for desertion contained the following provision: "The court doth further adjudge, order and decree that the marital rights of each party to this suit in and to any property owned by the other party be and the same are hereby extinguished." After the death of the husband the divorced wife instituted suit claiming dower in the real estate of her divorced husband, and a distributive share of his personal estate.

   Held: That, the decree in the divorce suit was intended to exclude the wife's right to claim dower upon the death of the husband, or an interest in his personal estate; and, that the language used was adequate to that purpose; and, as the subject was within the jurisdictional power of the circuit court, and the parties were before the court, the decree in the divorce suit, which has never been reversed or annulled, must conclusively be presumed to be correct, and it cannot be collaterally assailed in the instant suit.

2. DIVORCE—*Property Rights of Parties—Section 2263, Code of 1904—"Estate."*—Code of 1904, section 2263, provides that the circuit court may not only grant decrees for divorce but "may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them." It was argued that the contingent right of dower in the real estate, and the prospective right to a distributive share of the personal estate were not "estates," as that term is used in the statute.

   Held: That, while the contingent right of dower is not technically an estate but is a mere lien which may be released or relinquished, it is still a valuable property right, and the statute intended to confer upon the court the right not only to settle the status of the parties, but the future rights of each in the property of the other. Furthermore, the court has the right to make decrees concerning the estate of either party, and in

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the instant case a decree extinguishing the marital rights of the wife in her husband's property concerns the estate of the husband as well as the contingent rights of the wife, and it would seem clear from the very language of section 2263 that the court had this power.

3. DIVORCE A VINCULO—*Property Rights—Common Law.*—At common law, a divorce *a vinculo* could only be granted by the courts for a cause existing at the time of the marriage, and when the divorce was granted for such cause it avoided *ab initio* the property rights of the parties, so that there was neither dower nor curtesy in property then existing or thereafter acquired, and divorces for supervening causes could only be granted by act of parliament, which then became the law in the case.

4. DIVORCE A VINCULO—*Property Rights—Law in Virginia.*—In Virginia, where the divorce *a vinculo* determines the marriage *ab initio*, no marital right and consequently no right of dower or curtesy attaches, but where it is avoided for a supervening cause, and the marriage is void only from the date of sentence, it is said that, in the absence of any special provision in the sentence itself, dower and curtesy having attached already to the existing property of the parties are not as to that property impaired by the divorce.

5. DIVORCE A MENSA ET THORO—*Property Rights—Where Decree Contains no Provision—Common Law—Rule in Virginia.*—At common law a decree *a mensa et thoro* had no effect on the property rights of the parties, as there was no dissolution of the bond of matrimony, and they still remained husband and wife; and the same is true in Virginia in the absence of any order in the sentence of divorce, unless the separation is made perpetual, and, if, in a divorce *a mensa et thoro*, the separation is made perpetual, then it operates like a divorce *a vinculo* in respect of *after acquired* property, barring the claim of dower or of curtesy as to such property.

6. DIVORCE A MENSA ET THORO—*Property Rights—Rule in Virginia—Under Section 2263, Code of 1904.*—Section 2263 of the Code of 1904 provides that whether the divorce be from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, so that while the decree for a divorce *a mensa et thoro* does not affect the property rights of the parties if it is silent on that subject, yet the court may make such order with reference thereto as to it shall seem expedient. And as to existing property, the court has a

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right under this section to settle the rights of each party in respect to the property of the other, and if need be to extinguish them.

7. DIVORCE—*Property Rights—Conclusiveness of Decree.*—The discretion given to the court under Code of 1904, section 2263, to settle the rights of each party in respect to the property of the other must not be exercised arbitrarily, but the court must be guided by law and established principles relating to the subject. But whether or not the discretion was properly exercised, or the power given by the statute was properly exerted, are questions that are concluded by the decree in the divorce suit.

Appeal from a decree of the Circuit Court of Highland county. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Curry & Curry, John M. Colaw and *J. H. May,* for the appellant.

Timberlake & Nelson, Edwin B. Jones and *L. Travis White,* for the appellee.

BURKS, J., delivered the opinion of the court.

Peter Gum obtained a divorse *a mensa et thoro* from his wife, Mary Etta Gum, by a decree of the Circuit Court of Highland county, on November 26, 1914, which decree, so far as it is necessary to recite it, is as follows:

"This cause came on this day to be again and finally heard in vacation upon the papers formerly read and upon the depositions of witnesses taken on behalf of both the plaintiff and defendant—the cause having been submitted to the court for decision at the last term upon the whole record, and was argued by counsel.

"Upon consideration whereof, it appearing to the court

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from the evidence in this cause, independently of any admissions in the pleadings or otherwise, that the defendant on the 18th day of August, 1911, wilfully and without any just cause therefor deserted and abandoned the plaintiff, it is adjudged, ordered and decreed that the plaintiff be granted a divorce *a mensa et thoro* from the defendant.

"The court doth further adjudge, order and decree that the marital rights of each party to this suit in and to any property owned by the other party be and the same are hereby extinguished."

Peter Gum subsequently died on the 13th day of April, 1916. At the time of the decree above mentioned he was the owner of valuable real and personal property, which he continued to own until the time of his death. In July, 1916, the said Mary Etta Gum instituted this suit claiming dower in the real estate of the said Peter Gum, and a distributive share of his personal estate. The bill alleges that he owned no other real and personal estate at the time of his death except that which he owned at the time of the divorce. She files as exhibits with her bill a copy of the bill filed in the divorce suit, and also a copy of the final decree granting the divorce an extract from which has been hereinbefore set forth. No other portions of the record in the divorce suit are filed or introduced into the cause. In referring to the divorce suit in the present bill she avers that "the cause was much litigated," and the decree aforesaid shows that depositions were taken "on behalf of both the plaintiff and defendant." There was a demurrer to the bill in the instant case which was sustained, and from the decree sustaining said demurrer this appeal was allowed.

The complainant in her bill avers and charges "that provision in the aforesaid decree of divorce *a mensa et thoro*, that the marital rights of the parties to the said suit are extinguished, does not operate and is void as to property

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that the said Peter Gum, complainant's husband, owned at the date of said decree," and her counsel, in their reply brief, say: "It is admitted by appellant that if the decree in the divorce suit annulled her contingent rights in the estate of her husband that then the instant suit cannot be maintained and the decree appealed from must be affirmed." The chief inquiry, therefore, is as to the validity of the decree in the divorce suit.

If the court had jurisdiction of the parties and of the subject matter, and the matter decided was within the issues, then there can be no question as to the conclusiveness of the judgment. That the court had jurisdiction of the parties in this case cannot be doubted, as it appears from the decree in the divorce suit that depositions were taken on behalf of the wife, and as she says in her bill, the cause was much litigated. Chapter 101 of the Code gives to circuit courts the most complete and ample jurisdiction over the whole subject of divorce, and section 2263 expressly provides that the court may not only grant decrees for divorces but "may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them." It cannot be doubted from an examination of the various sections contained in chapter 101 of the Code that the court had complete jurisdiction of the suit for divorce, and to make such orders concerning the property and estate of either as it might deem expedient. It is said by counsel, however, that the question of her rights in the property of her husband were not put in issue by the divorce suit, and hence that the decree extinguishing her marital rights was to that extent a void decree. It must be borne in mind that we have before us nothing of the proceedings in the divorce suit except a copy of the bill and the final decree. The final decree indicates that the cause had been previously heard, as it begins by saying: "This cause came on this day to be *again*

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and finally heard." Whether or not the defendant filed an answer, or what defense she made, or what the proof was does not appear, nor does it appear whether the complainant, by petition, motion or otherwise, asked for a decree settling the property rights of himself and wife. As none of these matters appear in this record, it must be presumed that the divorce suit was regularly and properly conducted, and that the court did not exceed its powers in making the final decree. "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself without referring to the evidence on which it has been adjudged." *Voorhees* v. *Bank of U. S.*, 10 Pet. 449, 472, 9 L. Ed. 490.

Jurisdiction then having been acquired over the parties and the subject matter, every presumption is made in favor of the legality of the judgment when collaterally assailed. We have no means of ascertaining what proceedings were had in the divorce suit, except as shown by the exhibits filed with the bill in this suit, and as they do not disclose any defects in the decree which would render it void. it is presumed to be valid.

Whether or not it is necessary, in a suit for divorce, for the rights of either party in the property of the other to be put in issue by the pleadings in the cause, before the court can "make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them." it is unnecessary to decide. Upon this question we express no opinion.

It is further objected. however. that the decree in the

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divorce suit does not bar the appellant from asserting her right of dower and to a distributive share of the personal property, because the contingent right of dower in the real estate, and the prospective right to a distributive share of the personal estate are not estates, and the statute only authorizes the court to make decrees concerning the estate of the parties or either of them. While contingent right of dower is not technically an estate but is a mere lien or charge which may be released or relinquished, it is still a valuable property right, and we do not doubt that the statute intended to confer upon the court the right not only to settle the status of the parties, but the future rights of each in the property of the other. Under the provisions of chapter 101, the court has ample power to grant to the wife suit money, maintenance pending litigation, support for children, alimony, and to make other decrees concerning the estates of the parties deemed expedient by the court, and nothing is more common than to charge these sums of money as liens on the property of the husband. Furthermore, the court has the right to make decrees concerning the estate of either party, and in the instant case a decree extinguishing the marital rights of the wife in her husband's property concerns the estate of the husband as well as the contingent rights of the wife, and it would seem clear from the very language of section 2263 that the court had this power.

At common law, a divorce *a vinculo* could only be granted by the courts for a cause existing at the time of the marriage, and when the divorce was granted for such cause it avoided *ab initio* the property rights of the parties, so that there was neither dower nor curtesy in property then existing or thereafter acquired, and divorces for supervening causes could only be granted by act of parliament, which then became the law in the case. In Virginia, where the divorce *a vinculo* determines the marriage *ab*

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initio, no marital right and consequently no right of dower or curtesy attaches, but where it is avoided for a supervening cause, and the marriage is void only from the date of sentence, it is said that, in the absence of any special provision in the sentence itself, dower and curtesy having attached already to the existing property of the parties is not as to that property impaired by the divorce. As to divorces *a mensa et thoro*, at common law the decree had no effect on the property rights of the parties, as there was no dissolution of the bond of matrimony, and they still remained husband and wife; and the same is true in Virginia in the absence of any order in the sentence of divorce, unless the separation is made perpetual, and, if, in a divorce *a mensa et thoro*, the separation is made perpetual, then it operates like a divorce *a vinculo* in respect of *after acquired property*, barring the claim of dower or of curtesy as to such property. 2 Minor's Inst. (2d ed.), pages 119-120. Section 2263 of the Code, however, provides that whether the divorce be from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, so that while the decree for a divorce *a mensa et thoro* does not affect the property rights of the parties if it is silent on that subject, yet the court may make such order with reference thereto as to it shall seem expedient. There does not seem to be any doubt that, as to existing property—and the property in this case was in existence at the time of the decree for the divorce—the court has a right under this section to settle the rights of each party in respect to the property of the other, and if need be to extinguish them. In the instant case, the decree declares that the marital rights of each party to any property owned by the other, be and the same are hereby extinguished. We do not doubt that the court has power to enter such a decree in a divorce suit if the facts justify it.

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It is true that the discretion given to the court by this statute must not be exercised arbitrarily, but the court must be guided by law and established principles relating to the subject, and that an equitable view should be taken of all the circumstances of the case. But whether or not the discretion was properly exercised, or the power given by the statute was properly exerted, are questions that are concluded by the decree in the divorce suit, which cannot be inquired into in this collateral proceeding. The view we have taken above of the power of the court in the divorce suit, to cut off the contingent interests of the wife in her husband's estate, is confirmed by the opinion of the court in the case of *Hartigan* v. *Hartigan,* 65 W. Va. 471, 64, S. E. 726, 131 Am. St. Rep. 973, 17 Ann. Cas. 728. A careful reading of this case discloses that upon this question the expression of opinion of the court is a *dictum.* But whether that is so or not is immaterial. Without regarding the case as at all controlling in the instant case, we think the court put the proper construction on the West Virginia statute, which is the same as ours.

We have no difficulty in arriving at the conclusion that the decree in the divorce suit, "that the marital rights of each party to this suit in and to any property owned by the other party be and the same are hereby extinguished," were intended to exclude the wife's right to claim dower upon the death of the husband, or an interest in his personal estate, and that the language used is adequate to that purpose, and, as the subject was within the jurisdictional power of the Circuit Court of Highland county and the parties were before the court, the decree in the divorce suit which has never been reversed or annulled is conclusively presumed to be correct, and it cannot be collaterally assailed in the instant suit. For these reasons the decree of the Circuit Court of Highland county should be affirmed.

Affirmed.

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Syllabus.

Richmond.

HOSTER'S COMMITTEE V. ZOLLMAN AND OTHERS.

November 15, 1917.

1. SPECIFIC PERFORMANCE—*Discretion of Court.*—Specific performance of contracts to convey real estate is not a matter of right, but of sound judicial discretion—not, indeed an arbitrary or capricious discretion, dependent upon the mere pleasure of the court, but of sound and reasonable discretion, governed by well established general rules and principles. When these general rules and principles do not furnish the solution of any particular case, then its determination must depend upon the peculiar circumstances of that case.

2. SPECIFIC PERFORMANCE—*Requisites of the Contract—Mutuality of Obligation and Remedy—Consideration of Contract.*—To justify the court in decreeing specific performance of a contract, the contract must be based upon either a valuable or a meritorious consideration, and its terms must be definite. There must be mutuality in both the obligation and the remedy, and the person seeking the relief must show himself to have been ready, desirous, prompt and eager in the assertion of his rights.

3. SPECIFIC PERFORMANCE—*Laches.*—In a suit for specific performance the laches of the complainant will bar the relief. Thus, where more than thirteen years elapsed after the date of the contract sought to be specifically enforced, and there was no suggestion in the record as to the reasons for the delay in seeking its specific performance, such delay is a conclusive bar to relief. The parties to the contract must be construed to have mutually abandoned all right or claim thereunder.

4. SPECIFIC PERFORMANCE—*Definiteness of Contract—Parol Evidence.*—Where in a suit for specific performance of a contract for the sale of land, the whole transaction, as it appeared from the bill and the contract, was involved in so much doubt and obscurity that it was impossible therefrom to ascertain just what the parties agreed to, specific performance of the contract will not be decreed. While parol evidence may be introduced to supply deficiencies in the description of the land, or to explain ambiguities in the agreement, such evidence cannot be introduced to supply the lack of an agreement, or by construction to alter or vary it and create a different agreement from

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that to which the parties have assented. In the case at bar the vendee was insane and two of the vendors were dead. The danger of any attempt to remove the obscurities apparent upon the face of the document by the parol evidence of strangers to the contract was, therefore, obvious.

Appeal from a decree of the Circuit Court of Rockbridge county. Decree for defendants. Plaintiff appeals.

Affirmed.

The opinion states the case.

Wallace Ruff and *C. S. W. Barnes*, for the appellant.

Curry & Curry, H. S. Rucker, Hugh C. Davis and *Wm. A. Anderson*, for the appellees.

PRENTIS, J., delivered the opinion of the court.

C. S. W. Barnes, committee of W. A. Hoster (a person of unsound mind), filed his bill against the appellees for the specific enforcement of a contract to convey certain real estate.

The contract is in these words and figures:

"This contract made May 2, 1890, between Lorenzo S. Bryan, Josie A. Zollman and Virginia Lee Bryan, parties of the first part, and W. A. Hoster, party of the second part.

"Whereas the parties of the first part are the sole heirs at law of the late Mathew Bryan, who died intestate in the year 1854; and whereas the said Mathew Bryan in his lifetime by deed bearing date August 21st, 1851, recorded in Deed Book BB, page 398, of the clerk's office of Rockbridge county, Virginia, conveyed to James C. Brownlee and others one tract of land containing 500 acres, more or less, reserving, however, to the said grantor, Mathew Bryan, all mines and quarries of every description, and all

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water privileges whatsoever, and also the right of way through and over every part thereof and timber thereon.

"Another tract of land being and lying on Irish Creek, known as the Ambrose Campbell tract, containing 1,200 acres, more or less.

"And one containing 205 acres, more or less.

"Reserving to the said grantor, Mathew Bryan, all mines, minerals and quarries of every description to himself, and also right of way through and over every part thereof, and a part of the timber thereon.

"Another tract of iron ore lying in Augusta county known as the 'Mine Bank.'

"Also the iron ore land of Cotopaxi mines and surrounding lands of the said Mathew Bryan.

"Now, therefore, we the said parties of the first part do bargain and sell to the said party of the second part, all lands, minerals and timber of the estate of the said Mathew Bryan, wherever it may be found, and the purchase price thereof is not to exceed fifty thousand dollars.

"And the said parties of the first part bind themselves to pay all court expenses, and further agree to have all their property surveyed, and also to cause to be made a complete and perfect copy of abstract of title to the same, with maps or plats accompanying the same, and a copy of said survey, abstract of title and plats of said property shall be delivered to the said party of the second part, W. A. Hoster, and if found to be satisfactory, then the said party of the second part agrees to pay unto the said parties of the first part all the purchase money herein stipulated and contracted. In witness whereof we have hereunto set our hands and affixed our seals the day and year above written.

"L. S. BRYAN. (Seal)
"JOSIE A. ZOLLMAN, (Seal)
"VIRGINIA LEE BRYAN (Seal)
"W. A. HOSTER. (Seal)"

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On the same date the same Lorenzo S. Bryan, Josie A. Zollman and Virginia Lee Bryan conveyed the 500-acre tract of land upon Painter's mountain, in Rockbridge county, referred to in the contract, to the same W. A. Hoster, upon the condition that he (Hoster) was to remove all clouds from the title to the property, and that when the clouds upon the title had been removed he would pay to the grantors $30,000, one-half in cash and the balance in one and two years, the interest to commence when the clouds should be removed, and reserved a vendor's lien upon the property for such purchase money.

Although this deed and contract were executed May 2, 1898, this suit was not instituted until the 23rd day of August, 1915. The bill alleges that Hoster was adjudged to be a person of unsound mind in proper proceedings in the State of West Virginia, on the 30th day of January, 1912, and that his estate in Virginia was committed to Barnes on the 23rd day of August, 1915. Lorenzo S. Bryan died in August, 1910, and Josie A. Zollman also died after the contract was executed and before this suit was instituted, but the date of her death is not stated, and Virginia Lee Bryan has intermarried with one White. There is no explanation in the bill of the delay in instituting this suit for specific performance against the heirs at law of these decedents, Mrs. White and the adverse claimants of the property.

It is apparent from the statement of these facts that the decree of the court sustaining the demurrer of the defendants to the bill is plainly right.

Specific performance of contracts to convey real estate is not a matter of right, but of sound judicial discretion—not, indeed, an arbitrary or capricious discretion, dependent upon the mere pleasure of the court, but of sound and reasonable discretion, governed by well established general rules and principles. When these general rules and

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principles do not furnish the solution of any particular case, then its determination must depend upon the peculiar circumstances of that case. The contract must be based upon either a valuable or a meritorious consideration, and its terms must be definite. There must be mutuality in both the obligation and the remedy, and the person seeking the relief must show himself to have been ready, desirous, prompt and eager in the assertion of his rights. It is unnecessary to cite authorities for these doctrines, as they are everywhere accepted. A valuable note, collecting the Virginia and West Virginia cases, may be found in 3 Gratt. (Va. Rep. Anno.), at p. 628. See 12 Ency. Dig. Va. & W. Va. Rep. 569; 16 Ency. Dig. Va. & W. Va. Rep. 1136.

The laches of the complainant will bar the relief. *Richardson* v. *Baker,* 5 Call (9 Va.) 514; *Kelly* v. *Jones,* 6 Call (10 Va.) 205; *Ford* v. *Euker,* 86 Va. 79, 9 S. E. 500; *Clay* v. *Deskins,* 36 W. Va. 355, 15 S. E. 87; *Peers* v. *Barnett,* 12 Gratt. (Va. Rep. Anno.) 634, note.

From the date of this contract to the date when Hoster was adjudged insane in West Virginia, there elapsed more than thirteen years, and there is no suggestion in the record as to the reasons for the delay in seeking its specific performance, and under the circumstances of this case such delay is a conclusive bar to any relief. The parties thereto must be construed to have mutually abandoned all right or claim thereunder. *Hogg* v. *Shield,* 114 Va. 403, 76 S. E. 934; *Brashier* v. *Gratz,* 6 Wheat. 528, L. Ed. 323.

Even if Hoster had sought such specific performance promptly. it may well be doubted whether any relief could have been granted him, because of the indefiniteness of the contract and the lack of mutuality of remedy. Both the deed and contract were executed on the same day, and the one last executed may have been substituted for the one first executed; or possibly both must be construed together

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as parts of one and the same transaction. If the contract was not abrogated by the deed then it is not clear whether that contract evidences a sale or a mere option to Hoster to purchase, because it requires the vendors to pay all court expenses and have the property surveyed, and to deliver to Hoster the abstracts of title with maps or plats to accompany same, and provides that, if found to be satisfactory, then he (Hoster) agrees to pay to the vendors all of the purchase money thereby stipulated or contracted for. The owners may have intended by this to leave it to Hoster's discretion, after having received the abstracts of title and plats, to determine whether he would take the property or not, upon condition, however, that if he should exercise his option and take it he should pay all of the purchase money stipulated and contracted for, which by the express language of the contract "is not to exceed fifty thousand dollars." On the very same day, however, one of the tracts of land was conveyed to Hoster, upon condition that he was to remove all clouds upon the title to that particular property, and to pay the grantors $30,000 therefor. The bill makes no allegation or claim that these clouds have ever been removed, or that this $30,000 has ever been paid by Hoster, but seeks credit therefor, and prays that the other $20,000 of the $50,000 purchase money shall be apportioned by the court between the other parcels of land referred to. The whole transaction, as it appears from the bill and the contract, is involved in so much doubt and obscurity that it is now impossible therefrom to ascertain just what the parties agreed to, and while parol evidence may be introduced to supply deficiencies in the description of the land, or to explain ambiguities in the agerement, such evidence cannot be introduced to supply the lack of an agreement, or by construction to alter or vary it and create a different agreement from that to which the parties have assented. *Grayson L.*

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Co. v. *Young*, 118 Va. 122, 86 S. E. 826; *Edichal Bullion Co.* v. *Columbia Gold Mining Co.*, 87 Va. 641, 13 S. E. 100; *Darling* v. *Cummings' Ex'r*, 92 Va. 521, 23 S. E. 880; *Berry* v. *Wortham*, 96 Va. 87, 30 S. E. 443.

Now that the vendee is insane and two of the vendors are dead, the danger of any attempt to remove the obscurities apparent upon the face of the document by the parol evidence of strangers to the contract is obvious, and it is certain that the laches of the complainant constitutes a complete bar to any relief in this cause.

Affirmed.

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Syllabus.

Richmond.

MCCLUNG V. FOLKES.

November 15, 1917.

1. APPEAL AND ERROR—*Harmless Error—Case at Bar.*—There were three trials of the issue in the instant case. At the first trial there was a verdict for the defendant, which the court set aside on the motion of the plaintiff, because contrary to the evidence, and the defendant excepted. At the second trial there was a hung jury. At the third trial there was again a verdict for the defendant, which the court refused to set aside. At the last trial the court refused to receive certain evidence offered by the defendant to show different corners and lines from those set up at the first trial, unless the defendant would waive his bill of exception to the action of the court in setting aside the first verdict; the court being of opinion that the defendant should not be allowed to insist that the first verdict was right and then offer evidence to show that it was wrong. The defendant waived his exception under protest, and excepted to the action of the court in compelling him to make such waiver. This action of the trial court was assigned as error by the defendant.

   Held: That it was unnecessary to pass upon the question. Both verdicts were in favor of the defendant, and in the appellate court he vigorously insisted on the correctness of the last verdict, and asked that the judgment on the last verdict be affirmed. As the Supreme Court of Appeals was of opinion that he was right in his contention that the judgment should be affirmed, he could not have been hurt by his waiver though involuntarily made.

2. APPEAL AND ERROR—*Reversal—Rule as on Demurrer to Evidence.*—Where no exception was taken to the granting or refusing of instructions, and no objection was made in the Supreme Court of Appeals to the ruling of the trial court on the admission or rejection of evidence, the sole errors assigned being the refusal of the court to set aside the verdict as contrary to the evidence, and the judgment against the plaintiff for the entire costs of the litigation, the judgment must be sustained, if there is evidence to support it. It is insufficient

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that the Supreme Court of Appeals upon the evidence, if they had been the jury, would have found a different verdict, where the court from the record is unable to say that manifest injustice has been done, or that the verdict is without evidence to support it.

3. COSTS — *Prevailing Party — Disclaimer — Case at Bar.*—At the second trial the defendant entered a disclaimer as to about one acre of the land in controversy. Plaintiff refused to accept the disclaimer in satisfaction of his demand, and it was manifest that the land disclaimed was but a small part of the subject of litigation.

Held: That plaintiff was not entitled to recover costs up to the time of the disclaimer, where the verdict and judgment in a third trial was for defendant, as the case is controlled by section 3545 of the Code of 1904, providing that the party for whom final judgment is given shall recover his costs.

Error to a judgment of the Circuit Court of Highland county in proceedings on a caveat. Judgment for caveatee. Caveator assigns error.

Affirmed.

The opinion states the case.

Jos. A. Glasgow and *John M. Colaw*, for the plaintiff in error.

Curry & Curry, Timberlake & Nelson and *Andrew L. Jones*, for the defendant in error.

BURKS, J., delivered the opinion of the court.

C. C. Folkes was the owner of several tracts of land in Highland county, Virginia, and, desiring to correct uncertainties or mistakes in the boundaries thereof, applied to the circuit court of said county for an inclusive survey thereof. Code, sections 2337-2360. A caveat to prevent him from obtaining a new grant upon a resurvey of his lands was filed by L. M. McClung. Thereupon the court proceeded in a summary way, without pleadings, with the

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aid of a jury, to ascertain the material facts not agreed by the parties as provided by section 2330 of the Code. The jury was sworn to try the following issue agreed upon by the parties:

"Has the plaintiff a better right than the defendant to the land mentioned in the plaintiff's caveat, or to any part of said land? If the jury finds that the plaintiff has a better right to the whole of said land they will say so. If the jury find the plaintiff has not the better right to the whole of said land, they will say so. If the jury find that the plaintiff has not the better right to the whole of the said land, but has the better right to a part of said land, they will say so and state in their verdict to what part of the land the plaintiff has such better right. If the jury find that the plaintiff has not the better right to said land, or any part of the same, they will say so."

Upon the trial of this issue, the caveator, McClung, was the plaintiff, and the caveatee, Folkes, was the defendant. There were two trials and a mistrial of this issue, but for convenience we will speak of all of them as trials. At the first trial there was a verdict for the defendant, which the court set aside on the motion of the plaintiff, because contrary to the evidence, and the defendant excepted. At the second trial there was a hung jury. At the third trial there was again a verdict for the defendant, which the court refused to set aside at the instance of the plaintiff, but entered judgment thereon for the defendant, and to this action of the trial court the plaintiff excepted, and brings the case here for review.

During the progress of the last trial, the defendant claimed that since the first trial he had discovered errors in the corners and lines sought to be established on the first trial, and offered a new map and evidence to show different corners and lines from those set up at the first trial. The plaintiff objected to this departure from the

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case as made on the first trial and as shown by the map filed with the application for the inclusive survey, and the court refused to receive the map and evidence unless the defendant would waive his bill of exception to the action of the court in setting aside the first verdict; the court being of opinion that the defendant should not be allowed to insist that the first verdict was right, and then offer evidence to show that it was wrong. The defendant waived his exception under protest, and excepted to the action of the court in compelling him to make such waiver. This action of the trial court is assigned as error by the defendant in error, but in the view we take of the case it will be unnecessary to pass on it. Both verdicts were in favor of the defendant, and he is in this court now vigorously insisting on the correctness of the last verdict, and asking that the judgment on the last verdict be affirmed. As we are of opinion that he is right in his contention that the judgment should be affirmed, he could not have been hurt by his waiver though involuntarily made.

There was much evidence taken in the case on both sides, and it is of a highly conflicting nature. In addition to the testimony of numerous other witnesses, several surveyors were introduced by each party whose testimony conflicted, and a number of maps or blue prints showing points of controversy were also received in evidence. There was also introduced a large quantity of documentary evidence. Several trees also, alleged to be corners, were blocked and brought into court, and their annulations were pointed out by the witnesses, and finally the jury were taken upon the ground and given a view of the points in controversy. While there was this great volume of evidence relating to the issue submitted to the jury, the parties finally narrowed the issue between them to a single point, and each of them staked the fate of the case on whether the corner of one of the tracts was at a point which we may call A,

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or at a point which we may call B. At the request of the plaintiff, and without objection from the defendant, the court instructed the jury that if they believed the corner was at A, they should find for the plaintiff, and at the request of the defendant, without objection from the plaintiff, they were instructed that if they believed the corner was at B, they should find for the defendant. Other instructions were given at the instance of each of the parties without objection from the other. Under these circumstances, the jury found for the defendant, and we cannot disturb their verdict.

No exception was taken to the granting or refusing of instructions, and no objection is made here to the ruling of the trial court on the admission or rejection of evidence. The sole errors assigned are the refusal of the court to set aside the verdict as contrary to the evidence, and the judgment against the plaintiff for the entire costs of the litigation. The plaintiff is here as on a demurrer to the evidence, and we are unable to say that the verdict is without evidence to support it. Counsel for the plaintiff in error have very ably argued to show that certain evidence offered by the plaintiff in the nature of admissions was conclusive in his favor, and that no evidence to the contrary should be heard, and have offered authority to support their contention, but evidence to the contrary was freely offered and received without objection in the trial court, and we cannot now disturb its judgment. Upon the evidence as it appears in cold print, we think, if on the jury, we would have found a different verdict, but this is not sufficient. We are unable to say from the record that manifest injustice has been done, or that the verdict is without evidence to support it. *Jackson* v. *Wickham*, 112 Va. 128, 70 S. E. 539; *Blair & Hoge* v. *Wilson*, 28 Gratt. (69 Va.) 165.

At the second trial, the defendant entered a disclaimer

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as to about one acre of the land in controversy. It is insisted by counsel for the plaintiff in error that he should have recovered his costs up to that time, and that the trial court erred in entering judgment against him for the whole cost of the litigation. He refused to accept the disclaimer in satisfaction of his demand, and it is manifest that the land disclaimed was but a very small part of the subject of litigation. Several cases are cited by counsel for the plaintiff in error to sustain his contention, but it is unnecessary to review them because they appear to be either controlled by local statutes, or to be cases where the parties disclaimed all interest in the whole subject of litigation. More especially, however, we regard the question in the instant case as controlled by section 3545 of the Code, which provides that, "Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party; * * *"

The judgment of the circuit court should, therefore, be affirmed.

Affirmed.

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Syllabus.

Richmond.

NEW IDEA SPREADER COMPANY v. R. M. ROGERS & SONS.

November 15, 1917.

1. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Whether Plea One of Set-off or Recoupment.*—There were several contracts between the plaintiffs and the defendants, but where the special plea of defendants alleged facts from which the conclusion necessarily followed that the contract, out of the breach of which arose the set-off claimed by defendants, was a separate and distinct contract from that or those under which the indebtedness sued for by the plaintiffs arose, the plea was one of set-off under section 3298, Code of 1904, and not of recoupment under section 3299, Code of 1904.
2. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Whether Plea One of Set-off or Recoupment—Case at Bar.*—Plaintiffs brought an action against the defendants, their exclusive agents for the sale of manure spreaders in a certain territory, for the sum of $485.27, for certain spreaders sold and furnished by plaintiffs to defendants. This indebtedness arose under a contract or contracts existing between plaintiffs and defendants prior to the year 1915 and was admitted by defendants, who by a special plea claimed a set-off, aggregating the sum of $1,000, consisting of certain losses of profits by defendants, through a breach by the plaintiffs of a contract with the defendants, entered into on January 20, 1915, giving them the exclusive right to sell the plaintiff's manure spreaders in the same territory during the year 1915; the plaintiffs undertaking that they would fill all orders for defendants, at certain wholesale prices; and, that defendants should have the exclusive right to sell the manure spreaders of the plaintiffs in the territory so long as they might have on hand unsold spreaders so bought. Under this contract, defendants expended time and money in canvassing the territory, and took orders for twenty-six manure spreaders. Plaintiffs thereupon refused to fill an order by defendants for a carload of spreaders, and contracted with another agent in the territory for the sale of the spreaders. Defendants' plea set out *in totidem verbis* the stipulations in writing subject to which all the orders for goods were given, which were given by defendants, prior to the contract of Jan-

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uary 20, 1915. These stipulations were parts of the plea and showed on the face of it that each order prior to the contract of January 20, 1915, stood alone and formed the basis of a separate and distinct contract with plaintiffs, and ended when all the spreaders obtained by each respective order were sold. Therefore the ensuing allegations in the plea to the effect that the contract between plaintiffs and defendants existing in the summer of 1915, which was then broken by plaintiffs, was "upon the same basis and conditions as are set out" in said stipulations, alleged facts from which the conclusion necessarily followed that the contract, out of the breach of which arose the set-off claimed was a separate and distinct contract from that or those under which the indebtedness sued for by plaintiffs arose, and the plea was one of set-off under Code of 1904, section 3298, and not of recoupment under section 3299 of the Code of 1904.

3. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Plea of Set-off—Description of Claim.*—A plea of set-off which clearly described the set-off as consisting of loss of profits and set forth how and from what cause the loss of profits occurred described the set-off claimed by defendants so "as to give the plaintiffs notice of its nature" as required by section 3298, Code of 1904. Although the plea might have gone more into *particulars* as to several items of loss of profits, such as giving the names of the customers referred to, on loss of sales to whom the loss of profits alleged occurred, this would have added nothing to the description of *the nature* of the set-off claimed.

4. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Bill of Particulars.*—The remedy of the plaintiffs to obtain further particulars of the set-off claimed by the defendants was by motion for a bill of particulars under section 3249 of the Code of 1904, and not by objection to the plea.

5. CONTRACT FOR SALE OF MACHINERY—*Mutuality of Obligation.*—Plaintiffs assured defendants that if they would expend the necessary time and incur the necessary expense in making a canvass of certain territory to press the retail sale of plaintiffs' machinery during the year 1915, that plaintiffs would fill all orders defendants might in 1915 give for machinery at certain wholesale prices, and defendants should have the exclusive right to sell plaintiffs' machinery in said territory so long as they had on hand unsold goods. Accordingly, defendants made special efforts to sell plaintiffs' machinery and expended time and money in canvassing the territory and ordered of plaintiffs a carload of the machinery, which plaintiffs refused to furnish.

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Held: That there was a meeting of the minds of the plaintiffs and defendants upon a contract by which the plaintiffs agreed to sell and deliver to the defendants such machinery as defendants might make retail sale of and order of plaintiffs in the year 1915, and there was a binding obligation on the part of the defendants to take and pay for such machinery, so as to create a mutuality of obligation in the premises.

6. SALE OF GOODS—*Repudiation of Contract by Seller—Duty of Purchaser.*—Under the circumstances set forth in the preceding syllabus, the refusal of the plaintiffs to ship the carload of machinery ordered by the defendants relieved the defendants of the need to go through the useless performance of giving any further order.

7. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Loss of Profit.*—The loss of profit by defendants, on the sale of twenty-six manure spreaders, which they made before the breach by the plaintiffs of their contract to furnish defendants with the spreaders when ordered, was such damage as could be set-off under section 3298, Code of 1904.

8. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Statute—Construction.*—Section 3298, Code of 1904, has been liberally construed in furtherance of its obvious policy which is to prevent a multiplicity of suits and as far as may conveniently be done to effectuate in one action complete justice between the parties.

9. SET-OFF, RECOUPMENT AND COUNTERCLAIM—*Unliquidated Damages.*—If the amount of the claim of the defendant is so unliquidated that it cannot be ascertained by computation or calculation from definite data supplied by the evidence, and lies in mere opinion, as for instance, damages for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner; on a warranty for the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskillfully working raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury, such claim cannot be set-off under the statute, section 298, Code of 1904. But where the damages are to be assessed upon pecuniary demands and are determinable by computation or calculation from data supplied by the evidence, they are so far liquidated that they may be set-off under the statute in question.

10. MASTER AND SERVANT—*Breach of Contract of Employment—Damages.*—Where a breach of contract of employment occurs before the party thereto claiming damages for its breach has

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fully performed the contract on his part, he must, as soon as he knows of such breach of contract, minimize his damages by engaging in other employment, if he can obtain it, and not persist in thereafter continuing, in order to aggravate his damages, in a course of conduct which can under the circumstances be of no value to the party who has broken the contract. But this rule has no application to the instant case, where the profits in question were all completely earned by the defendants before they knew or had any intimation of the breach of contract on the part of the plaintiffs.

Error to a judgment of the Circuit Court of Augusta county, in a proceeding by motion for a judgment for money. Judgment for defendants. Plaintiffs assign error.

Affirmed.

STATEMENT OF THE CASE AND FACTS.

This is an action at law by the plaintiffs in error, a partnership, against the defendants in error, also a partnership, in which the former (hereinafter referred to as defendants) sought to recover of the latter (hereinafter referred to as plaintiffs) the sum of $485.27, with interest from August 1, 1915, for certain goods sold and furnished by plaintiffs to defendants.

The indebtedness referred to arose under a contract or contracts existing between plaintiffs and defendants prior to the year 1915.

There is no controversy as to this indebtedness of defendants to plaintiffs. It is admitted by defendants, but the latter, by way of confession and avoidance, filed in the case several special pleas. In the view we take of the case it is deemed sufficient here to say in reference to such pleas (without considering any of the other pleas therein) that plea No. 4, filed May 11, 1916, with the general replication thereto, put in issue certain claims to set-off by the de-

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fendants under section 3298 of the Code of Virginia, aggregating the sum of $1,000 consisting of certain losses of profits.

THE EVIDENCE.

There is much conflict in the evidence in the case. We do not feel that a review of all of it in detail would serve any useful purpose. It is deemed sufficient to point out the material evidence on the following points.

The testimony for the plaintiffs in effect admits that during the years 1913 and 1914 the defendants acted as agents for the plaintiffs in a certain territory under a number of sales contracts, under which the defendants were expected to press the business of retail sales and were to order from time to time goods at wholesale prices from plaintiffs; for all of which goods ordered, however, defendants were outright purchasers and absolutely bound to make payment therefor to the plaintiffs at certain wholesale prices; but for retail sale of such goods at retail prices fixed by plaintiffs, defendants had the exclusive right of sale in said territory so long as they might have on hand unsold any goods ordered by them and furnished by plaintiffs, the plaintiffs agreeing that they would not contract with any other agent or sell goods to any other agent or other person in such territory so long as defendants might have unsold goods on hand as aforesaid. That the profits of defendants consisted in the difference between said wholesale prices and retail prices, less the expense of time and money outlay by defendants necessary to make said retail sales. That plaintiffs knew that defendants expected to continue selling their goods in the same way in 1915; but did not notify or intimate to the defendants that they (the plaintiffs) would not allow them to do so, until in May, 1915, after defendants had acted up to that time upon an express agreement with plaintiffs made, as de-

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fendants' evidence shows, on January 20, 1915, as will be presently mentioned.

The precise point of difference between the plaintiffs and defendants as disclosed by the evidence in the case is this:

(a) The evidence for the plaintiffs is to the effect that the defendants' exclusive right to sell said goods in said territory ended when they sold out all goods they had on hand at any given time, if the plaintiffs in the meanwhile had not accepted and agreed to fill other orders from defendants for other goods. That as a matter of fact the contracts existing between plaintiffs and defendants during the years 1913 and 1914 did not bind plaintiffs to fill any orders from defendants except what they chose to fill. That each order stood alone and formed the basis of a separate and distinct contract. That in 1913 and 1914 the contracts as to each order, giving exclusive right to sell the goods covered by the order in said territory, ended when all such goods were sold. That as to 1915, no order was ever given during that year by defendants for goods. That if such order had been given, plaintiffs never agreed to accept or fill it; that there was no obligation on them to accept or fill any such order in 1915, and that all of the goods plaintiffs sold and furnished to defendants in 1913 and 1914 had been sold by defendants by March 1915 and before plaintiffs contracted with another agent in 1915 in said territory; and that plaintiffs contracted with such other agent because they were dissatisfied with defendants as agents because of their slowness in paying the amounts due by them and their lack of financial strength.

(b) The evidence for defendants is to the effect also, that during 1913 and 1914 each order given by them stood alone and formed the basis of a separate and distinct contract. That the contracts in 1913 and 1914 as to each order giving exclusive right to sell the goods covered by the order in said territory, ended when all such goods obtained

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by each respective order were sold. But that on January 20, 1915, before the goods sold by plaintiffs to defendants in 1914 were sold out, the plaintiffs, by their eastern manager, acting within the scope of his general authority as he was held out to the public and to defendants by the plaintiffs, on a personal visit of such manager to the defendants, assured the latter that if they would expend the necessary time and incur the necessary expense of making a special canvass of said territory to press the retail sales of said goods during the year 1915, that plaintiffs would fill all orders defendants might in 1915 give for goods, at certain wholesale prices (the retail prices being also fixed as aforesaid) and that defendants should have the exclusive right to sell the goods of the plaintiffs in said territory so long as they might have on hand unsold goods so bought. That defendants were directed by such manager to order such goods in 1915 thruogh the traveling salesman of plaintiffs when defendants were ready for the goods to be shipped. That the said manager complimented the defendants on their excellent record as agents of plaintiffs; expressed more than satisfaction with them as such and urged them to greater exertions in efforts to make sales of said goods in 1915; nor did the plaintiffs in any way intimate to defendants any dissatisfaction with them as agents. That accordingly defendants made special efforts to make retail sale of said goods in the winter and spring following said assurance on January 20, 1915; that they expended a great deal of time and some money in expenses in canvassing said territory; that in the progress of such canvassing they ordered of the plaintiffs through said traveling agent, as directed by said manager of plaintiffs, a carload of said goods, consisting of fifteen manure spreaders; that defendants continued to canvass said territory, with the further expenditure of time and money aforesaid and made retail sales, or, if they could have obtained delivery

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from plaintiffs as per said agreement, would have made retail sales of a total of twenty-six of said spreaders at the retail prices aforesaid, before they had any intimation that the orders they might place therefor would not be filled by plaintiffs. That at this time, in May, 1915, after they had made or practically made said retail sales, the plaintiffs refused to fill and did not thereafter fill, said order for said carload of spreaders; declined to ship any of such goods to defendants, contracted with another agent in said territory and shipped to him the carload of goods which defendants had ordered and expected to receive and followed that by shipments of other carloads of goods to such new agent. That all the expenditure of time and money which defendants had to make in order to consummate said retail sales in 1915, had been made by defendants before said breach of contract on the part of plaintiffs, except the delivery of a few of such spreaders which defendants had undertaken to deliver across country; that the profit aforesaid to defendants on each of said twenty-six spreaders sold or practically sold by them was $19.50 after deduction from the gross profit the expense of delivery of those of them which had to be delivered by defendants across country, as aforesaid; that by the simple calculation or computation consisting of multiplying $19.50 by 26, the amount of aggregate profit earned by defendants would be ascertained to be $507.00 or $21.73 in excess of said $485.27 sued for by plaintiffs.

Such in brief is a summary of the evidence and of the conflict therein on material points.

THE FACTS.

There was a trial by jury and a verdict for defendants for the sum of $8.00.

Under the rule on the subject applicable in this court

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the facts of the case must be considered by us to have been in accordance with the evidence as above outlined, with the omission of the evidence for plaintiffs in conflict therewith noted in paragraph (a) above.

A. C. Gordon and *Jos. A. Glasgow,* for the plaintiffs in error.

L. Travis White, Chas. Curry, Timberlake & Nelson, and *Carter Braxton,* for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court, as follows:

The following questions raised by the assignments of error in the case will be considered and passed upon in their order as stated below.

1. Did special plea No. 4 put the set-off claimed by defendants in issue under section 3298 of Code of Va. (the statute of set-off in Virginia), or under section 3299 of the Code of Va. (the statute of recoupment in Virginia)?

This plea states, with respect to the set-off claimed, that "the said defendants are willing and hereby offer, in pursuance of the statute in such case made and provided, to set-off and allow the same against the said sum of money supposed to be due and payable by the said defendants as demanded in the notice in this suit?"

The plea sets out in *totidem verbis* the stipulations in writing subject to which all the orders for goods were given, which were given by defendants, for the year 1913. These stipulations were parts of the plea and showed on the face of it that each order given by defendants for 1913 stood alone and formed the basis of a separate and distinct contract with plaintiffs. That these contracts for 1913, as to each order giving exclusive right to sell the goods covered by the order in certain specified territory, ended when

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all the goods obtained by each respective order were sold. Therefore the ensuing allegations in the plea to the effect that the contract between plaintiffs and defendants existing in the summer of 1915, which was then broken by plaintiffs, was "upon the same basis and conditions as are set out" in said stipulations, alleged facts from which the conclusion necessarily followed that the contract, out of the breach of which arose the set-off claimed, was a separate and distinct contract from that or those under which the indebtedness sued for by plaintiffs arose.

We are therefore of opinion that the special plea under consideration put in issue the set-off claimed by defendants under section 3298 aforesaid.

2. Did special plea No. 4 describe the set-off claimed by defendants so "as to give the plaintiffs notice of its nature" as required by section 3298 aforesaid?

Such plea alleged that in "the summer of 1915 without notice to the defendants and without cause, it (the plaintiffs) sold a large amount of goods, it had promised and agreed to sell exclusively to defendants, to other parties, to-wit, to E. F. Carpenter and others, contrary to the terms of said contract with defendants. And the said defendants further say that having made and entered into said contracts with plaintiffs, they devoted much time and labor to selling the machinery mentioned in said contract and in advertising same and had agreed to sell and deliver a large amount of said machinery to customers, and had secured from their customers the promise to buy said machinery from defendants and the profits to defendants from the machinery sold as aforesaid by them to their customers would have amounted to the sum of at least one thousand dollars. But the said defendants further say that the plaintiffs disregarded its said contract with defendants, sold its said machinery to other parties than defendants in the territory mentioned in said contract, and refused to sell to defendants, so that the defendants were unable to deliver the

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machinery sold as aforesaid to their customers, and to their customers who had agreed to buy said machinery from said defendants, so that defendants were caused by the plaintiffs to lose all the profits that they would have made had the plaintiffs complied with its said contract."

These allegations clearly describe the set-off as consisting of loss of profits and set forth how and from what cause the loss of profits occurred. It is not perceived how it could have described *the nature* of the set-off more clearly. It might have gone more into *particulars* as to the several items of loss of profits, such as giving the names of the customers referred to, on loss of sales to whom the loss of profits alleged occurred, but this would have added nothing to the description of *the nature* of the set-off claimed. The plea therefore was sufficient to describe *the nature* of the set-off claimed by defendants as required by the statute, section 3298 aforesaid.

The remedy of the plaintiffs to obtain further particulars of the claim was by motion for a bill of particulars under section 3249 of the Code of Virginia, not by objection to the plea. They made no such motion.

3. Was there in the instant case a meeting of the minds of the plaintiffs and defendants in 1915 upon a contract by which the plaintiffs agreed and bound themselves to sell and deliver to the defendants such number of spreaders as defendants might make retail sale of and order of plaintiffs in that year? And was there any binding obligation on the part of the defendants to take and pay for such spreaders, so as to create a mutuality of obligation in the premises?

It seems clear that the assurances of the plaintiffs to the defendants and the action of defendants upon and in accordance with the condition of such assurances, all as set forth in paragraph (b) of the statement of the evidence above, and the order by the defendants of a carload of

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spreaders, and the further action of defendants in efforts to make retail sales of additional spreaders, evidenced a meeting of the minds of the parties upon a contract such as is covered by the question under consideration. That the order aforesaid created a binding obligation on the part of the defendants to take and pay for the spreaders in question to the extent of the carload of fifteen spreaders there can be no doubt; and it is further true that the refusal of the plaintiffs to ship those and any other spreaders whatsoever, under a well settled rule of law, relieved the defendants of the need to go through the useless performance of in fact giving any further order.

The question 3, under consideration must, therefore, be answered in the affirmative.

4. Was the loss of profit by defendants, on the sales of the twenty-six spreaders, which they in effect made, before the breach by the plaintiffs of the contract referred to in question 3 above, such damage as could be set-off under section 3298 of the Code of Virginia?

This statute, so far as material, is as follows:

"In a suit for any debt, the defendant may on the trial prove and have allowed against such debt, any set-off which is so described in his plea as to give the plaintiff notice of its nature, but not otherwise. * * *"

This statute has been liberally construed in furtherance of its obvious policy which is to prevent a multiplicity of suits and as far as may conveniently be done to effectuate in one action complete justice between the parties. *Allen* v. *Hart*, 18 Gratt. (59 Va.) 722, 729.

It is true that if the amount of the claim of the defendants is so unliquidated that it cannot be ascertained by computation or calculation from definite data supplied by the evidence, and lies in mere opinion, "as for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner;

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on a warranty for the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskillfully working raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury," such claim cannot be set-off under such statute. *Tidewater Quarry Co.* v. *Scott,* 105 Va. 160, 162, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736, quoting from *Butts* v. *Collins,* 13 Wend. (N. Y.) 139. But where the damages are to be assessed upon pecuniary demands and are determinable by computation or calculation from data supplied by the evidence, they are so far liquidated that they may be set-off under the statute in question. *Richardson Co.* v. *Whiting,* 116 Va. 490, 493; 82 S. E. 87; *Tidewater Quarry Co.* v. *Scott,* 105 Va., at pp. 162-4. *United C. M. Co. v. Brown,* 119 Va. 813, 89 S. E. 850.

The case of *United C. M. Co.* v. *Brown, supra,* involved in principle the same question as that now under consideration in the instant case. In that case the appellant had the exclusive right under contract with appellee to supply the demand for certain machines in certain territory, in violation of this right appellee sold a certain number of such machines in such territory, whereby appellant lost the profit he otherwise would have made on such machines so sold. This court in that case held that "the amount to which appellant thereby became entitled is simply a matter of subtraction from the price at which the machines were sold, the price which appellant was to have paid for them," and that such lost profit was such a set-off as could and should be allowed under said section 3298.

The question 4 under consideration must therefore be answered in the affirmative.

5. Were defendants entitled to set-off the full amount of $19.50 profit on each spreader, the actual consummation of

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the retail sale which was prevented by the breach of contract of plaintiffs in not selling and delivering same to defendants as agreed?

It is true that such $19.50 was not net profit to the defendants on each of such spreaders. They had to incur the expenditure of the time and of some money in expense in advertising and in canvassing to make such sales. But such expenditure of time and money had been all made before the breach of contract on the part of the plaintiffs was known to defendants. The defendants, therefore, at the time they learned of the breach of contract, had earned the whole $19.50 of profit on each of such spreaders. Hence the defendants were entitled to set-off such full amount of profit on each spreader mentioned in the question we have under consideration.

It is not a case where a breach of contract occurs before the party thereto claiming damages for its breach has fully performed the contract on his part. In such case indeed the latter party must, as a general rule, as soon as he knows of such breach of contract, minimize his damages by engaging in other employment, if he can obtain it, and not persist in thereafter continuing, in order to aggravate his damages, in a course of conduct which can under the circumstances be of no value to the party who has broken the contract. The authorities cited for plaintiffs of 1 Clark & Skyles on the Law of Agency 830 and 1 Am. & Eng. Enc. of Law (2nd ed.) 1106 on the subject under consideration, have reference to cases such as next above referred to. They have no reference to such a case as that before us, where the profits in question were all completely earned by the defendants before they knew or had any intimation of the breach of contract on the part of the plaintiffs.

It should perhaps be again noted that, as has been above alluded to, any and all expense of delivery to the retail purchasers of the spreaders in question, had they been shipped

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by plaintiffs, was taken care of in the prices at which they were offered to be sold by defendants, so that said $19.50 on each spreader in question did not include any such expense.

Therefore question 5 under consideration must also be answered in the affirmative.

For the foregoing reasons we find no error in the judgment complained of and it will be affirmed.

Affirmed.

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Richmond.

NORFOLK AND WESTERN RAILWAY COMPANY v. SPATES.

November 15, 1917.

1. FIRES—*Railroads—Evidence as to Other Fires.*—In an action against a railroad for damages by fire, since the Featherston act, Acts of Assembly, 1908, p. 388, it is not error to admit evidence for the plaintiff that other engines of the railroad company at other times in the past had thrown out sparks and cinders and in some cases had set out fires at and near the locality of the buildings of the plaintiff, for damages for the burning of which the action was brought. Prior to the Featherston act, the ultimate question of fact in issue in railroad fire damage cases was whether the fire was *negligently set out* by the railroad company. Since the Featherston act the issue in such cases does not include negligence as an essential ingredient. Such ingredient consists only of the existence of the fact of the setting out of the fire by the railroad company by sparks or coals (cinders) dropped or thrown from some one or more of its engines, and that, under such act, is the ultimate fact in issue; and all evidence, whether circumstantial or direct, which tends to prove that issue, is admissible.
2. FIRES—*Railroads—Evidence as to Other Fires—Weight of Evidence.*—Evidence that on other occasions the engines of defendant company had thrown out sparks and cinders and in some cases had set out fires at and near the locality of the fire about which action was brought, was not conclusive evidence in itself, but admissible to be weighed and considered by the jury in connection with all the other evidence in the case.
3. FIRES—*Railroads—Evidence of Other Fires—Remarks of Court on the Evidence—Appeal and Error—Harmless Error.*—It was not error in the trial court in its ruling as to the admissibility of evidence of sparks and cinders being thrown out and fires started at other times, to remark that: "I think it admissible but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other occasions and therefore that it is *possible* for it to have thrown out fire at this time." The objection of the defendant to the ruling was the use of the word "possible" instead of the word "liable," as the court

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used in later rulings on the same question, but it was considered that in this connection the word "possible" was more favorable to the defendant than the word "liable." Moreover, in view of the admittedly correct instruction given by the trial court on this point, it does not affirmatively appear from the record that the jury was misled by this ruling or would or could, in accordance with the evidence, have rendered a different verdict from what they did, and hence the error in such ruling, if there was one, was harmless.

4. FIRES—*Railroads—Instructions.*—In an action against a railroad for damages by fire, the following instruction, "The court further instructs the jury that the burden of proof is upon the plaintiff to show by clear and affirmative testimony that the defendant set out the fire, the court telling the jury that it is not sufficient for the plaintiff to show that it was possible for the defendant to have started the fire but it must appear from the evidence that there was no other probable cause for the fire," is not contradictory in terms, or calculated to mislead the jury into believing therefrom that it was instructed that the railroad company was liable, unless it appeared from the evidence that there was no other probable cause for the fire, when taken in connection with another instruction, "that before the plaintiff can recover in this case the evidence must be such as to show more than a mere probability that the property was destroyed by sparks of fire or cinders set out by an engine of defendant company."

5. INSTRUCTIONS—*Multiplicity of Instructions.*—The practice of diminishing instead of multiplying instructions unnecessarily is rather to be commended than condemned.

6. INSTRUCTIONS — *Right to Instructions — Instructions Already Given.*—The principle that when an instruction prepared by counsel for either party states a correct principle of law, then the party offering it is entitled to have it given in the language employed in it, is subject to the well-settled qualification that when the jury have been fully and sufficiently instructed on a given point or points in a case, it is not error to refuse other instructions, though correct, on the same point or points.

7. FIRES—*Railroads—Instructions.*—It is not error to refuse an instruction (although the proposition of law enunciated is correct) that the jury cannot "presume from the happening of the fire that it was caused by the defendant company's engine or engines," where it did not appear that the jury were asked to apply such a presumption, but, on the contrary, other instructions clearly instructed them as to the law which nega-

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tived any such presumption. Moreover the instant case was not one in which the plaintiff was left by the evidence to rely upon such a presumption. She had other evidence in her behalf on the point. Hence the giving of such an instruction in such a case would have been confusing and misleading to the jury.

8. FIRES—*Railroads—Instructions—Evidence to Support.*—Where the evidence showed that the fire could only have arisen from causes for which defendant railroad was responsible and liable in damages under the Featherston act, it was not error to refuse an instruction that if the jury believed that the fire might have resulted from one of two causes, for one of which defendant was responsible, but not for the other, the plaintiff could not recover, nor could the plaintiff recover if it was just as probable that the fire was caused by the one as by the other cause.

9. FIRES—*Liability of Railroad—Featherston Act.*—A railroad is liable under the Featherston act for a fire originating in any of the following ways: (a) From coals, or cinders, dropped from an engine and thrown by the wheels on trash and dry vegetable matter on the right of way of the railroad company, from which the fire burned over the ground and communicated and set fire to plaintiff's property. (b) From sparks thrown from an engine on trash and vegetable matter on the right of way of defendant railroad, from which the fire burned over the ground and communicated and set fire to plaintiff's property. (c) From sparks thrown from an engine, beyond defendant railroad's right of way on to plaintiff's property.

Error to a judgment of the Circuit Court of Clarke county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

STATEMENT OF THE CASE AND THE FACTS.

This is an action by the defendant in error, plaintiff in the court below (hereinafter referred to as plaintiff), against the plaintiff in error (hereinafter referred to as railroad company), to recover damages for the burning of a store, warehouse, corn house and mill of the plaintiff by

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fire alleged to have been occasioned by sparks and coals dropped or thrown from an engine or engines of the railroad company.

There was a trial by jury which resulted in a verdict and judgment for the plaintiff and the case is brought here upon errors assigned by the railroad company because of the refusal of the trial court to set aside the verdict and grant it a new trial; of admission of improper testimony; improper ruling thereon; the giving of improper instructions and refusal to give proper instructions, as contended by the railroad company.

The suit was brought under the Acts of Assembly, 1908, p. 388, known as "The Featherston act," which (omitting the formal parts thereof), provides as follows: "That whenever any person shall sustain damages from fire occasioned by sparks or coals dropped or thrown from the engine or train of any railroad company, such company shall be liable for the damage so sustained, whether said fire shall have originated on said company's right of way or not, and whether or not such engine is equipped with proper spark-arresting appliances and regardless of the condition in which such appliances may be."

THE EVIDENCE AND FACTS.

The ultimate question of fact in issue in the case was whether the fire in question was occasioned or set out by sparks or coals (cinders) thrown or dropped from the engine or engines of the railroad company.

There was no eye witness of the setting out of the fire. The evidence relied on by the plaintiff to prove that the fire was set out by such sparks or coals (cinders) was wholly circumstantial.

As tending to prove the ultimate fact aforesaid the plaintiff introduced circumstantial evidence to the effect that on

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a great number of recent occasions, extending up to about the time of the fire and on one occasion shortly thereafter, sparks and cinders were thrown out at and very near the point or locality where said buildings were located, by engines of the railroad company. Most of this evidence was with respect to engines of trains going north (the same direction in which the engines of the identified freight train hereinafter mentioned were going), and some of such evidence was with respect to engines of trains going south or in the opposite direction. The first evidence so introduced was the testimony of the husband of the plaintiff. Such testimony and the ruling of the trial court thereon which is made the basis of one of said assignments of error, will best appear from the following quotations from the record:

"Q. Well, now, state to the court and jury whether or not you have frequently seen sparks and cinders thrown out at that point by the engines of the railway company?

"Defendant's objection. Counsel for defendant object to the question as wholly irrelevant, immaterial and incompetent.

"By the Court: I think it admissible, but not on the ground that the engines were defective, but to show that at that point the railroad company has thrown out fire on other occasions and therefore that it is possible for it to have thrown out fire at this time. Defendant excepted.

"A. Well, yes, sir, I have frequently seen them set fire out there. On one occasion—if you will let me have the diagram I will show you: On one occasion, I think about two years ago—

"Mr. Smith: You were not asked that question.

"Witness: I want to show where I had seen fire.

"Mr. Smith: You were asked if you had frequently seen sparks and cinders thrown out by engines.

"A. Yes, sir. I have frequently seen them thrown out and I wanted to show that one particular time.

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"By Mr. Whiting: Q. All right. State if you have ever known fire to occur at that point from sparks and cinders thrown out by engines going along the track of the Norfolk and Western Railway?

"Defendant's objection: Defendant by counsel object to the question for the reason heretofore assigned, and for the further reason that no time is fixed and it is impossible for the defendant to meet the evidence along this line. Defendant says the evidence should be confined to the particular engine or engines on that morning, that there is no averment in the declaration of the habit of throwing out fire, but that the averment in the declaration is as to this freight train, and that the defendant has not been called upon to answer other fires that might have been set out on other occasions.

"By the Court: The objection will be overruled. It is not admitted on the grounds that these engines throw out sparks improperly, but that at that particular place they were liable to throw out sparks. That is the point upon which this evidence is admitted, that because of the grade or other conditions at this particular point these engines or any engines are liable to throw out sparks when passing that place. Defendant excepts.

"A. (By witness). Yes, sir, I have. A number of times, and I wouldn't confine myself to the very number of times, but I would say in the last four years I have put out fire there forty times at different points along the road adjacent to this point.

"Defendant's motion to strike out answer. Thereupon defendant moves the court to strike out the answer of the witness as incompetent, immaterial and irrelevant; and, without interposing a specific objection to each and every question propounded along this line, asks that it be understood that the defendant is objecting to every question and excepting to every answer along this line.

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"By the Court: All right, the motion will be overruled.

"Q. (By Mr. Whiting): Had you finished your answer?

"A. On one or two occasions I have gotten water and put out ties when I closed the store at nine o'clock at night, when four or five would be burning at one time. So far as fire from sparks and cinders are concerned, I changed the construction of the corn roof on account of fire. When first built the corn house had a flat roof, running down to the mill—

"Defendant's Objection: Counsel for defendant objected to the answer being given by the witness because not responsive to any question.

"By the Court: No, I believe that is not responsive to the question.

"Q. (By Mr. Whiting): Mr. Spates, just state what, if anything, you know of sparks and cinders having been thrown out by the engines of defendant company's trains running along its track on to the roof of your building?

"Defendant's Objection: Counsel for defendant repeat their objection heretofore made. Objection overruled. Defendant excepts.

"A. Oh, yes, sir, invariably they throw sparks there when coming north. When they come up over the hill, after they pass through the dip in the track, they hit the top or end of the dip just above my store, and always open up the throttle and throw sparks. Frequently I have been in the store or in the warehouse particularly, and sparks will rain on the tin roof. They always open the throttle coming north and it throws sparks and cinders, too, in every direction.

"Q. What do you know about finding cinders on the top of the roof. Defendant objects. Objection overruled. Defendant excepts.

"A. Well. I have shoveled a bushel off there, and changed

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the roof on that account. Sparks and cinders accumulated on there and they might eventually set fire to something.

"Q. State if you have ever known fire to be started by the railroad company on the west side of your building from sparks thrown over the top of the building? Defendant objects. Objection overruled. Defendant excepts.

"A. Yes, sir, I have known them to throw sparks over the building—

"By the Court: I understand that you not only saw the sparks, but saw them thrown out there in the day?

"Witness: Yes, sir, I have on several occasions. I have stood on the siding and seen sparks rain out, and have walked around on the other side of the building and saw there was fire. The train *was pulling north* and had backed a car off the siding. Coming off the siding they had to use a great deal of steam power to get up that grade. In backing that car out of the siding they hit the grade and the engine threw sparks a distance of half-way between there and the stable."

In the progress of the trial the broad question of fact aforesaid, was narrowed, by the facts admittedly established by and as the evidence for the plaintiff was introduced, to the ascertainment of whether the fire was set out by sparks or cinders (singular or plural in number) thrown or dropped from one or both of two identified engines drawing a certain freight train going north which passed the buildings aforesaid a few minutes before the fire originated.

The railway company introduced, in its defense of the action, direct testimony of the enginemen and conductor of said freight train to the effect that these engines threw no sparks on the occasion in question when they passed by or anywhere near the said buildings; that all steam was shut off from these engines at such time, so that they were then merely *drifting;* that when *drifting* it was impossible for

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the engines to throw out sparks; so that if this direct evidence as to the engines having no steam on them at such time was true, it was *impossible* for the fire to have been set out *by sparks* from them or either of them.

However, the testimony for the defendant let fall the facts that while the rules and orders of the railroad company required its employees operating said freight train and all other trains of the railroad company to run slowly by the said point or locality, owing to the changes in grade and curves in the railway track thereabout, and with the throttles of the engines of trains going north closed and the engines drifting by, it was admitted by some of the witnesses for the defendant that such rules and orders had not been invariably obeyed; that the latter had indeed been frequently violated by the employees of the railroad company operating its trains, and they admitted, in effect, that they themselves were guilty of violating such rules and orders at the time of the fire in question, to the extent of running said freight train at a greater rate of speed than that allowed at that locality by such rules and orders, although they insisted that they had the steam shut off from the engines as aforesaid.

Here was a conflict between the circumstantial evidence for the plaintiff and the direct evidence for the railroad company on the question of fact of whether the engines pulling said freight train had the steam shut off or not, and whether consequently they did or did not throw out sparks at said locality at the time of the setting out of the fire in question. It was a question of fact for the jury whether they did or did not believe the direct testimony for the railroad company on this point.

The evidence for both the railroad company and the plaintiff agreed that *all* of the engines of the railroad company threw sparks at said locality, when the steam was *not* shut off from them, whether going north or south along the railway track.

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The evidence as to the coals (or cinders), both for the plaintiff and railroad company, agreed that they might have been dropped from the ash pans of the engines of said freight train, on the main line of the railway opposite said buildings on the occasion in question. That there was no inflammable matter on the main line of railway track itself at this point; that there was a side-track between said main line of railway track and the said buildings, with the usual space between such tracks, both of which and the space between them was free of inflammable matter; but from the side-track to the corn house, which first took fire, there was a distance of sixteen feet, on which was lying some dry weeds and other vegetable matter cut by the railroad company a few days before the fire and also some "trash." The right of way of the railroad company extended to within about one foot of said corn house, or fifteen of said sixteen feet, on which said dry vegetable matter and trash lay. The evidence is conflicting as to the amount of such vegetable matter and trash, and as to whether the fire first caught near the side-track and burned over to the corn house, or caught first in, under or near the corn house and after, or while setting fire to the corn house, burned back to the side-track; but (omitting a good deal of immaterial evidence as to places on the ground here and there between the buildings and the side-track and at the north end of the buildings not burned over), the evidence was to the effect that from the railway siding at a point somewhat north of the corn house thence along the said right of way to the corner of the corn house, where the fire therein first started, the ground was all burned over. And there was evidence as to the strength and amount of the flames seen burning on the ground by the side of the corn house, as compared with those seen burning on the ground past the corn house to the south, and the ends of the ties of the side-track, all seen burning soon after the fire started

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in the corn house, from which the jury was warranted in concluding that the fire was set out on the right of way of the railroad company by sparks or cinders (singular or plural), and extended to the corn house.

The evidence was that there was little or no wind, but that the flames slightly inclined from the direction of the railway track towards the buildings as they were seen burning in places across the said right of way, while the fire at the buildings was in progress.

The evidence is conflicting as to whether coals or cinders (singular or plural) would likely have been thrown from the main line railway track to the dry vegetable matter on the right of way of the railroad company aforesaid and the evidence leaves it uncertain whether sparks or cinders (singular or plural) fell on such vegetable matter. The husband of the plaintiff testified, as a witness for the latter, on this subject as follows:

"There are two ways it (the railroad company) could have set fire to the buildings. One is it may have dropped a cinder from the ash pan, and the wheels knocked it down from the track, and it rolled into the trash, which very frequently happens. It has frequently happened and one time it dropped down there and a train had to stop and put it out. And it could have set fire from a spark thrown out of the smoke stack. Either way it could have happened."

Beyond this, however, the evidence leaves it uncertain whether the fire started on the right of way of the railroad company or not. It might, consistently with the evidence, have started from a spark or sparks thrown from one or both of the engines of said freight train, falling in or next to or under the corner of the corn house, beyond the right of way of the railroad company, or from a cinder or cinders dropped and knocked by the wheels of the engine or engines and rolled into the trash on the right of way as above indicated.

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SUMMARY OF FACTS.

Under the rule applicable in this court in such case, the material facts which we must consider may have been found by the jury, and hence must be considered as found by us, may be summarized as follows:

The fire which burned the buildings aforesaid, originated from the engine or engines of the railroad company, from

(a) Coals (or cinders) dropped from one or both of the engines of said freight train, thrown by the wheels on the trash and dry vegetable matter on the right of way of the railroad company aforesaid, from which the fire burned over the ground and communicated and set fire to the corn house, etc.; or

(b) Sparks thrown from one or both of the last named engines on such trash and vegetable matter on the said right of way, from which the fire burned over the ground and communicated and set fire to the corn house, etc., or

(c) Sparks thrown from one or both of the last named engines, beyond the right of way aforesaid, within or next to or underneath (through a door in the planking underneath and near the corner of) the corn house, etc.

If the fire originated in any of these three ways it fell within the provisions of the Featherston act, and the railroad company was liable for the damages sustained by the plaintiff by reason thereof.

Roy B. Smith and *Marshall McCormick,* for the plaintiff in error.

Ward & Larrick and *F. B. Whiting,* for the defendant in error.

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SIMS, J., after making the foregoing statement delivered the following opinion of the court:

We will consider and pass upon the questions raised by the several assignments of error in their order as stated below:

1. Was it error to admit evidence for the plaintiff that other engines of the railroad company at other times in the past had thrown out sparks and cinders and in some cases had set out fires at and near the locality of the buildings of the plaintiff, for damages for the burning of which this action was brought?

Before the Featherston act the law required a plaintiff, in order to recover damages against a railroad company caused by fire, to prove two things, namely, (1) That the railroad company in fact set out the fire; and (2) that the setting out of the fire was due to negligence of the railroad company.

In that state of the law, by a number of decisions of this court, it became settled, prior to the Featherston act, that, although the proof might show that a fire was set out by a railroad company, there could be no recovery therefor if the evidence failed to show the existence of negligence on the part of the railway company; and it was held as a general rule that the evidence failed to show the existence of such negligence, if it appeared therefrom (a) that the engine from which the fire originated was in good repair, in charge of a competent and experienced engineman, or locomotive engineer, that it was equipped with the best mechanical appliances in known and practical use for preventing the escape of sparks; and was not run in a negligent manner so as to unnecessarily throw out sparks and coals or cinders; and (where the fire originated on the right of way of the railroad company) (b) that the defendant exercised reasonable care to keep such right of way clear of combustible matter liable to ignition by sparks or coals

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discharged from passing engines and to communicate fire to the property of others. *White* v. *N. Y. P. & N. R. Co.*, 99 Va. 357; 38 S. E. 180; *N. & W. Railway Co.* v. *Briggs*, 103 Va. 105; 48 S. E. 521; *Atlantic, etc., R. Co.* v. *Watkins*, 104 Va. 154, 51 S. E. 172; *Phillips* v. *Railway Co.*, 109 Va. 437, 63 S. E. 998. The rule as to the effect of evidence showing that the engine was in good repair, would of course, prior to the Featherston act, have applied to the dropping of coals or cinders and would have negatived the existence of negligence in that regard and hence of liability for damages for fire caused thereby.

Therefore, prior to the Featherston act, the ultimate question of fact in issue in railroad fire damage cases was whether the fire was *negligently set out* by the railroad company. Upon that issue it was necessarily held that "after the plaintiff has identified with certainty the engine alleged to have communicated the fire complained of, it is not admissible to introduce evidence of other fires communicated along the company's right of way without first showing that the other fires were set out from the engine in question." This was because, in the then state of the law, *negligence* being an essential ingredient to be found to exist in a case before any liability of the railroad company could arise, when the injury complained of was shown to have been caused, or could only have been caused by a known and identified engine, the evidence had necessarily to be confined to the condition, management and practical operation of that engine, in order to ascertain whether the railroad company was guilty of *negligence* with respect thereto. *N. & W. Railway Co.* v. *Briggs, supra.* Evidence which might have been relevant as tending to prove that the fire was in fact set out by the railway company, consisting of evidence of the frequency of fires set out by the engines of such company indiscriminately, clearly could not be relevant to the issue in such state of the law, which was

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whether there was negligence in the condition or management of the identified engine. The other engines of the railroad company may have set out fires, whether because defective in condition or negligently operated, or not, and the identified engine may have set out the fire in question, but if the latter was not defective in condition or negligently operated there was no liability upon the defendant in such state of the law. That is to say, the rule in *N. & W. R. Co.* v. *Briggs, supra,* above referred to, was established when and because in the then state of the law *negligence* was an essential ingredient and, indeed, was the gist of the action in railroad fire damage cases, and not merely the fact of the setting out of the fire. Since the Featherston act the issue in such cases does not include negligence as an essential ingredient. Such ingredient consists only of the existence of the fact of the setting out of the fire by the railroad company by sparks or coals (cinders) dropped or thrown from some one or more of its engines, and that, under such act, is the ultimate fact in issue; and all evidence whether circumstantial or direct, which tends to prove that issue, is admissible, and the aforesaid rule in the case of *N. & W. Ry. Co.* v. *Briggs, supra,* is no longer applicable.

The first assignment of error raising the question we have under consideration, is based on the aforesaid rule in the case of *N. & W. Ry. Co.* v. *Briggs, supra.* That rule not being applicable since the Featherston act, our conclusion necessarily is that such assignment of error is not well taken.

The ultimate issue of fact under the Featherston act being the single question whether the fire was set out or originated from sparks or coals (cinders), singular or plural, thrown or dropped from an engine or engines of the railroad company, manifestly, as above noted, any evidence tending to prove such fact is admissible. Evidence to the

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effect that the engines of the railroad company indiscriminately, without exception (which would of course *prima facie* include the identified engines aforesaid), throw sparks at the locality in question, clearly was evidence tending to sustain said issue in behalf of the plaintiff and hence was admissible. It was not conclusive evidence in itself, but admissible to be weighed and considered by the jury in connection with all the other evidence in the case.

2. Was it error in the court, in its first ruling as to the admissibility of evidence of sparks and cinders being thrown out and fires started, to have said: "I think it admissible but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other occasions and therefore" that it is *possible* for it to have thrown out fire at this time?

The objection to this ruling of the appellant is to the use of the word *possible* therein. It is urged that this being the first ruling of the court on the admissibility of such evidence, although the court did in later rulings on the same subject substitute the word "liable" for "possible," the first ruling was calculated, and, as appellant contends, did leave the impression on the minds of the jury, that if the evidence showed a bare possibility that the two engines in question threw the sparks, the jury might consider the evidence as sufficient to warrant their finding in favor of the plaintiff, whereas the true rule is that the evidence must be sufficient to show such fact by a clear preponderance before the jury had the right to consider it in favor of the plaintiff.

It is admitted that the trial court correctly instructed the jury on the point under consideration, by one of the instructions given after the evidence was all in, but it is insisted that this could and did not remove the erroneous impression aforesaid.

In the view we take of it, the objection to this ruling of

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the court was not well taken. It seems to us that the use of the word *possible* was not unfavorable to the appellant. What the court said in the ruling in question had not the remotest reference to the matter of what it was necessary for the plaintiff to prove in order to recover. The court ruled the evidence admissible on the issue as to whether the railroad company in fact set out the fire, as consisting of evidence of circumstances tending to prove that fact, to the extent of showing that such fact was *possible*. The court did not say or indicate to the jury that if the plaintiff stopped there she could recover. It was a step in her proof, and certainly a necessary step to establish that it was at least *possible* for the fire to have been set out by the railroad company, before she could ask that her other evidence be considered on the issue before the court. The use of the word *possible* by the learned trial judge was indeed but an extremely careful and guarded manner of statement, lest he should create an impression adverse to the appellant; and was less likely to have prejudiced the railroad company, than the use of the word "liable" employed later on in connection with the same ruling as to the admission of similar evidence, to which no objection is urged. The use of the word "liable" went farther than "possible" in the statement of what might be the effect or weight of the evidence ruled upon, and manifestly the use of the word "possible" in the first instance by the learned trial judge, was as above indicated, out of abundant precaution lest he create an impression on the minds of the jury that they might consider such evidence as going beyond the step of showing that the throwing out of fire by the engines at the point in question was *possible*.

However, and further, it seems clear to us, in view of the admittedly correct instruction given by the trial court on this point, that it does not affirmatively appear from the record that the jury was misled by this ruling or would or

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could, in accordance with the evidence, have rendered a different verdict from what they did, and hence the error in such ruling, if there was one, was harmless. *Standard Paint Co.* v. *Vietor,* 120 Va. 595, 91 S. E. 752.

Omitting reference to the instructions which involve the question first above considered and passed upon, the questions raised by the assignment of error based upon the action of the trial court in giving and refusing instructions will now be considered.

3. Was instruction No. 3, given at the instance of the plaintiff, contradictory in terms, or calculated to mislead the jury into believing therefrom that it was instructed that the railroad company was liable, unless it appeared from the evidence that there was no other probable cause for the fire?

Instruction No. 3 referred to is as follows:

"3. (Given.) The court further instructs the jury that the burden of proof is upon the plaintiff to show by clear and affirmative testimony that the defendant set out the fire, the court telling the jury that it is not sufficient for the plaintiff to show that it was possible for the defendant to have started the fire but it must appear from the evidence that there was no other probable cause for the fire."

When read in connection with instruction No. 4, which was given by the trial court, it is clear that instruction No. 3 is not amenable to the objections urged against it which are indicated in the question under consideration. Instruction No. 4 is as follows:

"4. (Given.) The court instructs the jury that before the plaintiff can recover in this case the evidence must be such as to show more than a mere probability that the property was destroyed by sparks of fire or cinders set out by an engine of defendant company, and it is not necessary to prove it beyond a reasonable doubt. If it is shown affirmatively by a clear preponderance of the evidence that the fire

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was caused by sparks or coals or cinders emitted from an engine of defendant, the proof is sufficient."

Hence this question must be answered in the negative.

4. Was it error in the trial court to refuse instruction A. offered by the railroad company?

Instruction A. referred to is as follows: "A. (Refused, except as modified in instruction given). "The court instructs the jury that the burden of proving that the fire complained of in the plaintiff's declaration was caused by the engine or engines of defendant company is on the plaintiff and must be proven by a preponderance of all the testimony to the satisfaction of the jury. It is not sufficient for the plaintiff to show a probability that the fire was so caused, nor can the jury presume from the happening of the fire that it was caused by the defendant company's engine or engines. In other words, the court means to tell the jury that it is incumbent upon the plaintiff to show how and why the fire occurred, and the plaintiff cannot leave the jury to the determination of the question by conjecture, guess or random judgment or upon mere supposition."

The provisions of this instruction were substantially and fully covered by instructions Nos. 1, 3 and 4 given by the trial court. Instructions Nos. 3 and 4 are above quoted. Instruction No. 1 was as follows:

"1. (Given.) The court instructs the jury if they believe from the evidence that the plaintiff in this case sustained damage from a fire occasioned by sparks, cinders or coals emitted or thrown from an engine of defendant, as alleged in the declaration, and that the defendant was a railroad company at the time of the said fire, then the plaintiff is entitled to recover of the defendant the damage so sustained at the date of the fire; and the plaintiff would be entitled to recover such damage without any reference to any insurance collected by the plaintiff."

Counsel for the railroad company say in this connection:

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"We invoke the principle again that when an instruction prepared by counsel for either party states a correct principle of law, then the party offering it is entitled to have it given in the language employed in it." This principle is subject to the well-settled qualification that when the jury have been fully and sufficiently instructed on a given point or points in a case, it is not error to refuse other instructions, though correct, on the same point or points. *Luck, etc., Co.* v. *Russell County*, 115 Va. 335, 79 S. E. 393; *Bowman* v. *First Nat'l Bank*, 115 Va. 463, 80 S. E. 95; *Ney* v. *Wrenn*, 117 Va. 85, 99, 84 S. E. 1; *Eastern Motor Co.* v. *Apperson-Lee Co.*, 117 Va. 495, 85 S. E. 479; *Smith* v. *Stanley*, 114 Va. 117, 130, 75 S. E. 742; *Cutchin* v. *Roanoke*, 113 Va. 452, 74 S. E. 403. As stated by this court in *Wygal* v. *Wilder*, 117 Va. 896, 901, 86 S. E. 97: "The practice of diminishing instead of multiplying instructions unnecessarily is rather to be commended than condemned."

In regard to the following named provision in said instruction A., to-wit, "Nor can the jury presume from the happening of the fire that it was caused by the defendant company's engine or engines," it should be said that this unquestionably enunciated a correct proposition of law. It could have had no helpful effect, however, if such an instruction had been expressly given in the instant case. It does not appear that the jury were asked in such case to apply such a presumption. On the contrary instructions Nos. 1, 3 and 4 clearly instructed them as to the law which negatived any such presumption. Moreover the instant case was not one in which the plaintiff was left by the evidence to rely upon such a presumption. She had other evidence in her behalf on the point. Hence the giving of such an instruction in such a case would have been confusing and misleading to the jury.

Therefore there was no error in the refusal of the trial court to give such instruction.

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5. Was it error in the trial court to refuse instruction B. offered by the railroad company?

Instruction B. referred to is as follows: "B. (Refused as embraced in instruction given.) The court further instructs the jury that if it believes from the evidence that the fire complained of may have resulted from one of two causes, for one of which defendant is responsible, but not for the other, the plaintiff cannot recover, nor can the plaintiff recover if it is just as probable that the fire was caused by the one as by the other cause."

There was no evidence in the case to support this instruction. There were only two causes (cinder or spark) for, and two ways of the setting out of, the fire, as it in fact occurred—(by origin on the right of way of the railway company or beyond it) as disclosed by the evidence (as above set forth in the summary of facts). For any *and all* of these the railroad company was responsible and liable in damages under the Featherston act, if the fire occurred in any or all of such ways. The rule invoked by the instruction, while well settled, has, therefore, no application to the instant case.

The instruction under consideration was evidently offered under the assumption that the evidence tended to show that there was still another cause for the fire, namely, that it was caused by the carelessness of boys playing cards in the buildings. There is no such fact testified to or shown in evidence, however, in the case. The only reference to any such matter is in the testimony of the husband of the plaintiff. He says that when he saw the fire "I started down to investigate *thinking* some boys might be playing cards." But what he saw on his arrival at the fire and the other evidence in the case entirely excluded any such hypothesis being supported by or being consistent with the evidence.

Hence this instruction was also properly refused.

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6. Was it error in the trial court to refuse instruction C. offered by the railroad company?

Instruction C. referred to is as follows: "C. (Refused as covered so far as proper by instructions given.) The court further instructs the jury that if the plaintiff fails to establish by affirmative proof sufficient to satisfy reasonable and well-balanced minds any one fact necessary to prove that the fire was set out by the defendant company, they shall find for the defendant."

The provisions of this instruction were substantially and fully covered by other instructions given by the trial court. What is said above on this subject in connection with instruction A., refused by the trial court, is deemed equally applicable, *mutatis mutandis*, to the instruction now under consideration.

Hence there was no error in the refusal of this instruction.

We come now to the question raised by the only remaining assignment of error which we have not passed upon, namely:

7. Was there error in the refusal of the trial court to set aside the verdict of the jury and grant a new trial?

The above statement of evidence deemed to be material, and the above summary of facts, sufficiently answer this question in the negative, and a discussion thereof, it is believed, would needlessly prolong this opinion.

For the foregoing reasons we find no error in the judgment complained of and it will be affirmed.

Affirmed.

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Syllabus.

Richmond.

PIRKEY V. GRUBB'S EXECUTOR AND OTHERS.

November 15, 1917.

1. CHARITIES — *County as Donee — Enabling Act — Donation.*—The General Assembly of Virginia passed an act (Acts 1912, p. 111), providing that the county of Rockingham should be capable, through its board of supervisors, "to accept any donation or any trust made for benevolent or charitable objects of a public nature, not religious or sectarian, within its external territorial limits, and to perform such conditions and execute such trusts as may be imposed upon it by the terms of the instrument by which the donation is made or the trust is created." Subsequent to this act a testator by his will directed that his estate should be converted into money and gave the proceeds to the county of Rockingham on condition that said county should forever pay interest, at the rate of four per cent. per annum, on the amount received by it, to the Rockingham Memorial Hospital, the hospital to apply the interest or income to the support or maintenance in its hospital of indigent patients from the county of Rockingham and the town of Harrisonburg.

Held: That though this bequest might not be technically a trust, it was a donation to the county, upon condition, while the interest thereon when paid by the county to the hospital constituted a trust fund of which the Rockingham Memorial Hospital was the trustee. The general purpose of the act is the aid of benevolent and charitable objects of a public character within the territorial limits of the county of Rockingham, and the county is enabled by the act to effectuate this object, either by the acceptance of donations or the execution of trusts committed to it.

2. CHARITIES—*County as Donee—Enabling Act—Donation.*—In the instant case, therefore, there was a valid enabling act, the provisions of which have been carefully observed by the testator in his commendable efforts to provide a beneficent public charity, coupled with an acceptance of the gift upon the condition attached by the donor thereto, which condition is altogether reasonable in itself and the result of its acceptance is that the taxpayers of the county of Rockingham and town of

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Harrisonburg are, to the extent which the fund will provide, relieved of a burden which would otherwise rest upon them.

3. CONSTITUTIONAL LAW—*Power of Legislature.*—The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has supreme legislative power except so far as it is restrained by the State or federal Constitution.
4. COUNTIES—*Power of Board of Supervisors—Supervisors Binding Their Successors.*—A board of supervisors may incur an obligation for a proper public purpose, when so authorized by the General Assembly, which will bind its successors indefinitely.
5. CHARITIES—*Benevolent Object of a Public Character.*—The establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a benevolent object of a public character; this is manifest from sections 1719 and 1720 of the Code of 1904, authorizing such hospitals and their maintenance out of the public funds; and the maintenance of the indigent poor is also a benevolent or charitable object of a public character.

Appeal from a decree of the Circuit Court of Shenandoah county. Decree in favor of one of the defendants. Another of the defendants appeals.

Affirmed.

The opinion states the case.

Charles A. Hammer and *D. O. Dechert*, for the plaintiff in error.

Conrad & Conrad and *Sipe & Harris*, for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

At its 1912 session, the General Assembly of Virginia passed an act in these words:

"An act to permit the county of Rockingham, through its board of supervisors, to accept donations and trusts made for benevolent or charitable objects of a public character

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within its territorial limits, and to perform such conditions and execute such trusts as may be connected with the same. Approved February 29, 1912.

"Whereas a citizen of this Commonwealth has manifested a desire by his last will and testament to bestow his estate, or a part thereof, upon the county of Rockingham, on condition that said county shall forever pay interest on the amount received by it to the Rockingham Memorial Hospital, a corporation without capital stock, incorporated to establish and conduct a hospital in the town of Harrisonburg, in the said county, the interest so paid to be applied by the hospital authorities to the discharge of the expenses in the hospital of indigent patients from the county of Rockingham and the town of Harrisonburg; and some doubt existing as to the legal competency of a county of this State to accept a gift of the sort proposed; and it being deemed to be in accordance with sound public policy and the public good to sanction and permit the acceptance of a gift of the sort so proposed, or others of a like or similar character or object; therefore,

"1. Be it enacted by the General Assembly of Virginia, That the county of Rockingham shall be capable, through its board of supervisors, to accept any donation or any trust made for benevolent or charitable objects of a public nature, not religious or sectarian, within its external territorial limits, and to perform such conditions and execute such trusts as may be imposed upon it by the terms of the instrument by which the donation is made or the trust is created.

"No such gift or trust, if accepted by the board of supervisors, shall be declared or held to be void for insufficient designation of the beneficiaries or uncertainty as to the objects thereof, but in all such cases the gift, grant, devise or bequest, as the case may be, shall be valid; and in any case where, under the principles now governing in

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courts of equity, the objects or beneficiaries of the donation or trust are so undefined or uncertain as not to admit of specific enforcement or administration by a court of equity, the same, if accepted by the county authorities, shall be administered or executed so as to effectuate as nearly as may be the intent or object of the donor or founder." (Acts 1912, p. 111).

On the 11th day of May, 1912, R. M. Grubb made his last will and testament, the pertinent parts of which are:

"I, R. M. Grubb, of the county of Rockingham, in the State of Virginia, do make, publish and declare this to be my last will and testament.

"I will and direct that all my property, both real and personal, shall be sold by my executor at public sale to the highest bidder, and that all my just debts and funeral expenses be paid as soon after my decease as practicable.

"I bequeath an annuity of sixty dollars a year, to be paid semi-annually during her lifetime, to Clementine Thompson, who served faithfully during the last illness of my mother and sister and has since been my housekeeper; this annuity to be paid out of the income of my estate, and as a first charge upon it, by the Rockingham Memorial Hospital, hereinafter mentioned. * * *

"I give and bequeath all the residue of my estate to the county of Rockingham on condition that said county shall forever pay interest, at the rate of six per centum per annum, on the amount received by it, payable semi-annually to the Rockingham Memorial Hospital, a corporation duly incorporated under the laws of Virginia, now equipping a hospital in the town of Harrisonburg, the said hospital to pay the annuity aforesaid to Clementine Thompson during her lifetime out of the interest or income so received by it, and apply the residue of such interest or income to the support or maintenance in its hospital of indigent patients from the county of Rockingham and the town of Harrison-

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burg, the hospital authorities to provide by means of such by-laws, rules and regulations as they may see fit to adopt the benefits of this fund, it being my desire and intent, as far as my substance will suffice, to provide the means of furnishing hospital advantages to indigent persons of the county and town who may have need of the same, leaving it to the hospital authorities to ascertain or determine the individual beneficiaries of this fund. The benefits of this fund, however, to be apportioned between indigent patients from the county, and indigent patients from the town in proportion to population.

"In case the county of Rockingham should decline the bequest made by this, my will, or the same should fail for any cause, then and in that event, I give and bequeath the whole of my estate, left after the payment of my debts and funeral expenses, and the satisfaction of the provisions for the cemetery fence, to the said The Rockingham Memorial Hospital, the same to be placed at interest in the safest and best paying securities and the interest or income to be applied as hereinbefore provided.

"And in the event that the bequests hereinbefore made to The Rockingham Memorial (that is the bequest of the interest to be paid by the county of Rockingham, or, in case that should fail, the bequest of my whole estate made in the clause immediately preceding this one) for the uses specified should fail or be defeated on the ground of uncertainty, as to the individual beneficiaries, or for any other cause or reason whatsoever, then and in that event, I give and bequeath the whole of my estate left after the payment of my debts and funeral expenses, and the satisfaction of the provisions for the cemetery fence aforesaid, to the said The Rockingham Memorial Hospital without condition, limitation or qualification of any sort whatsoever, except that the said corporation shall pay the annuity aforesaid to Clementine Thompson.

* * * * *

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"I hereby revoke all words or clauses in this will giving any part of the principal of my estate to the Rockingham Memorial Hospital."

Codicil to the Within Will.

"I hereby alter the conditions of the bequest to the county and limit the rate of interest to four per centum per annum on the entire amount which it may receive.

"In case that the county of Rockingham should refuse the gift of the residue of my estate after paying annuity to Clementine Thompson and the bequest to the cemetery, I then give the same to Miss Fannie Pirkey, daughter of Albert and Amanda *Amanda* Pirkey, of near Massanutton Springs, in Rockingham county, Va. Provided she pays the two former bequests made in this my will."

The testator died in January, 1913. On the 7th day of April, 1914, the board of supervisors of Rockingham county, against the protest of counsel for the appellant, Fannie V. Pirkey, passed a resolution in these words:

"It appearing to the board that the greater portion of the Grubb estate is in the hands of the executor ready for disbursement and that Dr. J. M. Beidler, the said executor of R. M. Grubb, deceased, is desirous of knowing whether the board is or is not going to *except* the legacy or trust to the county of Rockingham under said will, and the board having heard the arguments of counsel passed the following resolution: be it resolved that the board of supervisors of Rockingham county does hereby signify its intention and willingness to accept and does hereby accept the gift or bequest to said county of Rockingham, under the will of R. M. Grubb, deceased, subject to the charges, conditions and limitations contained in said will and codicils thereto."

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Whereupon, the executor filed a bill, making the interested parties defendants, in which he alleged that he had converted the estate into cash and was ready to pay the amount over to those entitled to receive it, but that inasmuch as the appellant denied the validity of the bequest to the county of Rockingham and the capacity of the county to take the gift made to it under the will, he asked the aid and guidance of the court, a judicial determination of the rights of the interested parties, and special directions as to the disposition of the remainder of the estate in his hands. Each of the defendants answered the bill, and the appellant, Fannie V. Pirkey, filed a demurrer and an answer, which she asked to be treated as a cross-bill, and prayed therein that she be declared by decree entitled to take the estate. Upon this state of the pleadings, there being no dispute as to the facts, the court overruled the demurrer, denied the relief prayed for in the cross-bill, dismissed it, and directed the executor to pay the annuity to Clementine Thompson from the date of decedent's death to the time of payment, and to pay over the residue and such further sums as might be thereafter received by him to the county of Rockingham, after satisfying the costs and proper attorneys' fees; and further directed that, in accordance with the terms of the bequest, the county forever pay to the Rockingham Memorial Hospital interest on the amount received at the rate of four per centum per annum.

From this decree Fannie V. Pirkey appealed.

The validity of the bequest to the county of Rockingham is to be determined.

The appellant denies that the act approved February 29, 1912, hereinafter called the enabling act, is sufficient to validate the bequest. To epitomize this contention in the language of the appellant's reply brief, "It is not contended by appellant that there is any conflict between the title of the act and the act itself, so far as the enacting clause is

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concerned. The real contention is that neither the title nor the enacting clause provides for any transaction such as is described in the preamble, or as is involved in the acceptance of the provisions of the will here in controversy." In support of this contention counsel have quoted many authorities to establish their proposition, that this bequest to the county is not technically a "trust." While this may be true, it is only true subject to the qualification that the people of the county, not the board of supervisors, are the beneficiaries, and the principal of the fund can only be used for some proper public purpose for the benefit of such beneficiaries. Technically the bequest is a donation to the county, upon condition, while the interest thereon when paid by the county to the hospital constitutes a trust fund of which the Rockingham Memorial Hospital is the trustee. The statute, however, both in its title and enacting clause, refers not only to trusts, but also to donations and gifts. The title in express terms indicates its object, and in aid or promotion of that object permits the county of Rockingham "to accept donations * * * made for benevolent or charitable objects of a public character within its territorial limits, and to perform such conditions * * * as may be connected with the same." This deleted quotation from the title omits all reference to "trusts" contained therein, for it also refers to trusts which may be made for the same purpose, and authorizes the county to execute the same. The first paragraph of the enacting clause fully accords with the title, and clearly authorizes the county of Rockingham, "through its board of supervisors, to accept any donation * * * made for benevolent or charitable objects of a public nature, not religious or sectarian, within its external territorial limits, and to perform such conditions * * * as may be imposed upon it by the terms of the instrument by which the donation is made * * *." It is true that the same clause, by the words omitted in the quotation just

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made, also authorizes the county to "accept" and "execute" "any trust" that may be imposed upon it by the terms of the instrument by which "the trust is created," but the distinction between trusts and gifts is still clearly maintained.

This distinction is also carefully preserved in the second and last paragraph of the enacting clause, by the use of appropriate and carefully selected language, concluding with the provision that the gift or trust "shall be administered or executed so as to effectuate as nearly as may be the intention or object of the donor or founder," "donor" being precisely the appropriate word to use if the bequest is a gift, and "founder" just the appropriate technical word to be used if the bequest is a trust.

Referring now to the preamble of the act, it is perfectly apparent that it was passed because the legislature had been informed of the purpose of this testator to bestow a part of his estate upon the county of Rockingham, and the preamble refers specifically to this gift or donation at that time contemplated, and recites that it is "deemed to be in accordance with sound public policy and the public good to sanction and permit the acceptance of a gift of the sort so proposed, or others of a like or similar character or object." This preamble clearly indicates that the legislature had been informed of the purpose of the testator to make this identical donation on condition that the county should pay interest on the principal of the amount thereof.

Under these circumstances, it is impossible for us to doubt the manifest intention of the legislature to remove every obstacle which could possibly prevent the accomplishment of the testator's benevolent purpose.

The donation here involved might have been made effective by leaving out of the act all reference to trusts, but it was doubtless suggested that possibly this testator, or some other, might prefer, instead of making a gift to the county, to bequeath his estate to the county in trust for benevolent

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and charitable uses, and so passed an act to validate any such bequest in either form.

The general purpose of the act is the aid of benevolent and charitable objects of a public character within the territorial limits of the county of Rockingham, and the county is enabled by the act to effectuate this object, either by the acceptance of donations or the execution of trusts committed to it.

That the legislature had power to pass such an act cannot be doubted, for it has supreme legislative power except so far as it is restrained by the State or federal Constitution. *Henry's Case*, 110 Va. 879, 65 S. E. 570, 26 L. R. A. (N. S.) 883; *Button* v. *State Corporation Commission*, 105 Va. 634, 54 S. E. 769, and cases cited.

That a board of supervisors may incur an obligation for a proper public purpose, when so authorized by the General Assembly, which will bind its successors indefinitely, is also clear, and one instance of this may be found in *Lynchburg* v. *Amherst County*, 115 Va. 600, 80 S. E. 117, where the county of Amherst was held bound by its contract with the city of Lynchburg for one-half the cost of repairs upon the bridge across James river connecting the county with the city, for amounts not exceeding $100 at any one time, although the only authority for this specific obligation was found in the special act which authorized the city and county jointly to make the purchase of the bridge, and "to determine and fix the terms and conditions on which the bridge was to be used."

The purpose of this charity is to provide a fund for the support and maintenance of indigent patients from the county of Rockingham and the town of Harrisonburg in the Rockingham Memorial Hospital. That the establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a benevolent object of a public character, is manifest from sections 1719 and 1720 of the

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Code, authorizing such hospitals and their maintenance out of the public funds; and it seems hardly necessary to say that the maintenance of the indigent poor is also a benevolent or charitable object of a public character.

So, then, it seems clear to us that we have here a valid enabling act, the provisions of which have been carefully observed by the testator in his commendable efforts to provide a beneficient public charity, coupled with an acceptance of the gift upon the condition attached by the donor thereto, which condition is altogether reasonable in itself and the result of its acceptance is that the taxpayers of the county of Rockingham and town of Harrisonburg are, to the extent which the fund will provide, relieved of a burden which would otherwise rest upon them.

The briefs indicate great industry and quote many authorities, suggest many difficulties, propound several questiois, but in our view of the case no good purpose would be served by prolonging this discussion, because we are of the opinion that the enabling act furnishes a complete reply to every suggestion and argument which has been or can be made against the validity of the bequest, answers every question raised, solves every doubt which it is possible to suggest, and removes the inquiry from the forum of debate. The controlling question here is whether in view of the enabling act this bequest is valid. As to this we have no doubt whatever, and the decree of the trial court is plainly right.

Affirmed.

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Richmond.

SPROUL AND ANOTHER v. HUNTER, EXECUTOR, AND OTHERS.

November 15, 1917.

1. EXECUTORS AND ADMINISTRATORS—*Resort to Court for Direction and Advice.*—Although executors have power under the will to sell the property belonging to the estate, the possession of such authority in no way deprives them of the right to go into a court of equity for aid and guidance in the discharge of their duties, and to have the property sold under its decree.
2. JUDICIAL SALES—*Sales by Executor under Order of Court.*—A sale made by order of a court of competent jurisdiction, *pendente lite*, is a judicial sale. Thus, where an executor having authority under a will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and to report it to the court for confirmation, which he does, the sale is a judicial sale.
3. JUDICIAL SALES—*Sale of Land by Executors under Direction of Court—Case at Bar.*—A testator by his will authorized his executors to sell his farm, estimated by the testator in the will to contain about 775 acres, and invest the proceeds. Under the will the executors were authorized to sell and reinvest all the real estate owned by the testator at his death. Notwithstanding these provisions, the executors invoked the instruction and direction of the Corporation Court of the city of Staunton in the discharge of their duties by a bill of conformity. The corporation court assumed jurisdiction of the suit and the administration of the estate, making the necessary orders therein as occasion required. The executors conceiving that a sale of the farm would be advantageous, listed the same with a real estate agent to procure a purchaser; and it was described by the agent as containing 800 acres. The agent procured appellants as prospective purchasers and submitted an offer in writing by them to purchase the farm and personal property upon it for $50,000. This was accepted by the resident executor subject to the approval of his co-executor, and the further confirmation of the court. The co-executor signified his approval of this acceptance. The executors then filed their petition in the suit for conformity for the purpose of

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obtaining the sanction and approval of the court to a sale of the farm. The court passed a decree, directing the executors to sell the farm in pursuance of the prayer of their petition. Accordingly, by deed bearing even date with the petition and decree, a conveyance was made by the executors to appellants, reciting the decree authorizing and directing the sale for the consideration named in the written proposal of the farm in question, described as "containing 800 acres more or less." The executors then filed their report of the sale and requested the approval by the court of their action, and that the sale be confirmed. The court thereupon entered a decree declaring that the sale had been made in pursuance of the former decree, that the land brought a fair price, that the action of the executors was approved, and, therefore, ratified and confirmed the sale.

Held: That the sale was a judicial one, and that the appellants were not entitled to an abatement of the purchase money to the extent of the alleged deficiency in the land.

4. JUDICIAL SALES—*Caveat Emptor—Case at Bar.*—Under the circumstances set forth in syllabus 3, testator's will was the source of appellant's title, and that instrument and the petition for the sale apprised the intending purchasers that the farm for which they were negotiating was supposed to contain 775 acres. Still, they stood by and suffered the court to direct the sale upon that assumption, and afterwards to confirm it, without objection. At a subsequent term, it is true, they sought the aid of the court to relieve themselves from the consequences of an assumed deficiency of acreage in the farm. But the sale was a judicial sale, and the doctrine is well settled in this jurisdiction that the principle of *caveat emptor* strictly applies to judicial sales. Speaking generally, all objections of which the party complaining had previous knowledge come too late after a decree of confirmation.

Appeal from a decree of the Corporation Court of the city of Staunton, in a cause in which appellants were allowed to file their petition against the appellees, executors under the will of Robert W. Burke, deceased. From a decree dismissing the petition, petitioners appeal.

Affirmed.

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The opinion states the case.

Bumgardner & Bumgardner, for the appellants.

J. M. Perry, for the appellees.

WHITTLE, P., delivered the opinion of the court.

The essential facts and circumstances of this litigation will sufficiently appear from the discussion of the questions involved.

In the year 1905, the executors and trustees under the will of Robert W. Burke, deceased, filed a bill for conformity against the beneficiaries of the estate, in the Corporation Court of the city of Staunton, invoking the instruction and direction of the court in the discharge of their duties. The bill also contained the prayer that plaintiffs be authorized to sell certain bank stock belonging to the estate to pay debts; that proper compensation be allowed the executors; that they be permitted from time to time to settle their accounts in the suit, and for general relief. The corporation court assumed jurisdiction of the suit and the administration of the estate, making the necessary orders therein as occasion required, and the case has remained on the docket hitherto.

Among other property belonging to the estate was a valuable farm located in the vicinity of Staunton, which is described in the will as containing about 775 acres. The will invested the executors with extensive powers as trustees in the management of the estate; and authorized them, in their discretion, to sell, publicly or privately, and convey any real estate owned by the testator at his death, and to reinvest the proceeds upon the trusts set out in the will. But in case of sale of the 775-acre farm, the proceeds were directed to be invested separately and kept apart from the

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rest of the estate such proceeds to stand as the representative and substitute of the farm for all purposes of the will. The executors conceiving that a sale of the farm would be advantageous, listed the same with a real estate agent to procure a purchaser; and it was described by the agent as containing 800 acres. The agent procured appellants as prospective purchasers, and on January 19, 1917, they submitted to him an offer in writing to purchase the farm "containing approximately 800 acres, * * * together with all implements, horses, harness and colts on the place, including also the corn, fodder and growing crops exclusive of the tenants' share," for $50,000; $10,000 in cash on delivery of a good and sufficient deed; and the residue to be evidenced by five bonds, each for the principal sum of $8,000, bearing 6 *per cent.* interest, payable in one, two, three, four and five years, with privilege of anticipating any or all of the said bonds at any regular interest period. On the same date the appellee, Hunter, addressed to the real estate agent his acceptance of the offer, "subject to the approval of my co-executor, E. Butler Burke, and the further confirmation of the court." The co-executor having signified his approval of the conditional acceptance of Hunter, the executors, on January 20, filed their petition in the suit for conformity in which they alleged, that they were invested with full power and authority by testator's will to sell any part of the estate, including the 775-acre farm, the proceeds of which, in the event of a sale, were to be reinvested in accordance with the provisions of the will; that they were satisfied that a sale would promote the interests of all persons interested in the estate; yet, they did not care to take that step without first securing the approval and direction of the court, which had theretofore been and still was engaged in the administration of the estate; and that it was for the purpose of obtaining the sanction and approval of the court that they filed their petition; that if the court

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concurred in the opinion of petitioners that the farm should be sold, they prayed to be authorized to employ a real estate agent to assist them in effecting the sale. The petition concluded with the general prayer for a decree directing the sale and reinvestment of the proceeds. On the same day the court passed a decree, directing the executors to sell the farm in pursuance of the prayer of their petition.

Accordingly, by deed bearing even date with the petition and decree, a conveyance was made by the executors to appellants, H. B. Sproul and D. G. Ruckman, reciting, among other things the decree of the corporation court authorizing and directing the executors to sell the farm at their discretion, and in their judgment, and for the consideration named in the written proposal, of the farm in question, described as "containing 800 acres more or less." On January 22 the executors received the cash payment and bonds for the deferred instalments, and delivered the deed to the purchasers. On January 27 they filed their report of sale, which recited that the sale was made "in pursuance of the decree entered herein on January (20) 1915," the receipt of the cash payment and bonds for the purchase price, and conveyance of the land to the purchasers. The executors requested the approval by the court of their action, and that the sale be confirmed. Thereupon, the court entered a decree declaring that the trustees had properly exercised their discretion under the will, that the sale had been made in pursuance of the former decree, that the land brought a fair price, that the action of the trustees in connection therewith was approved, and, therefore, ratified and confirmed the sale. The decree also approved and confirmed the compensation allowed the real estate agent and directed its payment.

On March 11 the purchasers filed their petition in the cause, in which, after setting out the terms of their offer

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to purchase the land, they represented that the farm was composed of four contiguous tracts of land, containing in the aggregate 806 acres and 30 poles; that petitioners' purchase included the four tracts, and that the sale was consummated on January 22 (by payment of $10,000 and the delivery of the bonds) in accordance with the written offer on their part, and the delivery of the deed by the executors; that the sale was by the acre and the farm was guaranteed to contain 800 acres, the purchase price being $48,000 or $60 per acre; that the additional $2,000 constituted the price of the personal property on the land, which was sold along with the farm, making the total consideration $50,000, as set out in the deed. The petition went into details in respect to the alleged shortage in acreage, which it is unnecessary to relate, and prayed an abatement of the purchase money to the extent of the alleged deficiency in the land.

The executors made specific answer to all the material averments of the petition, and controverted petitioners' right to any relief in the premises. The cause was heard on the pleading and evidence, and the decree under review dismissing the petition was entered.

In their answer respondents suggested that if the court should be of opinion that petitioners had been misled to their injury, that the proper measure of relief would be to place all parties *in statu quo* by rescinding the sale.

We are of opinion that in no aspect of the case were appellants entitled to relief.

I. At the date of appellants' offer to purchase the farm, E. B. Burke was living in the city of Washington; his co-executor, C. S. Hunter, was on the ground and practically conducted the negotiations on behalf of the estate. The farm was estimated by the testator in his will to contain about 775 acres. and Hunter did not observe that the deed to Sproul and Ruckman described it as 800 acres, more or

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less. Immediately on his attention being called by Sproul to the claim of the purchasers for an abatement of the purchase money on account of the alleged shortage, the following colloquy ensued: Sproul suggested that he would have the land surveyed, in which suggestion Hunter acquiesced, and remarked, "if the farm ran over—decidedly over," with the approval of the court, the purchasers would get the benefit of the excess. But Sproul insisted that Hunter should also guarantee the shortage, if any, which he declined to do. He proposed, however, to return the cash payment and deliver up the bonds, and bear the loss of the revenue stamps on the deed, "and call the matter off." This counter proposition Sproul declined, remarking that he had paid a fee for examining the title. Hunter then expressed his willingness to bear one-half of that expense, but Sproul rejected both offers. In point of fact the land has never been surveyed, and the alleged deficiency was not otherwise shown to exist.

II. Viewing the controversy from a different angle, we are of opinion that the sale was a judicial sale. The minds of the parties never met on any other hypothesis. The executors had already invoked the aid and direction of the court in the administration of the estate and the discharge of their duties as executorial trustees. The court had assumed jurisdiction of the parties and the subject matter, and, from time to time, entered decrees in furtherance of the objects of the suit. In these circumstances, it was plainly the duty of the executors, whatever may have been their powers under the will, to submit this transaction, perhaps the most important that had arisen in the course of their administration, to the judgment and decision of the court. Accordingly, Hunter's acceptance of appellants' tentative offer to purchase the farm was expressly made subject to the confirmation of the court. This qualified acceptance was approved by his co-executor and received

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without objection by the appellants; and there is nothing in the record to suggest bad faith on the part of the executors in pursuing that course. The procedure adopted by counsel for the executors to effectuate the purpose of the parties was customary and proper. The petition and decree prepared for the court's action were submitted to counsel for the appellants, and (with full apportunity for examination, and investigation of matters to which they called attention) without objection, the decree ordering tne sale was entered; and subsequently the report of sale, likewise without objection, was approved and confirmed by a decree of the court.

It is the settled rule in this State that although executors have power under the will to sell the property belonging to the estate, the possession of such authority in no way deprives them of the right to go into a court of equity for aid and guidance in the discharge of their duties, and to have the property sold under its decrees. *Shepherd* v. *Darling*, 120 Va. 91 S. E. 737; *Gooch* v. *Old Dom. Tr. Co.*, 121 Va., 92 S. E. 846.

Testator's will was the source of appellants' title, and that instrument and the petition for the sale apprised the intending purchasers that the farm for which they were negotiating was supposed to contain 775 acres. Still, they stood by and suffered the court to direct the sale upon that assumption, and afterwards to confirm it, without objection. At a subsequent term, it is true, they sought the aid of the court to relieve themselves from the consequences of an assumed deficiency of acreage in the farm. But we think it clear that the sale was a judicial sale, and the doctrine is well settled in this jurisdiction that the principle of *cavoat emptor* strictly applies to judicial sales. Speaking generally, all objections of which the party complaining had previous knowledge come too late after a decree of confirmation. The case of *Long* v. *Weller*, 29 Gratt. (70 Va.)

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347, 371, is a leading case on the subject. The opinion was delivered by Burks, J., who cites in support of the principle above announced the following cases: *Throlkolds* v. *Campbell,* 2 Gratt. (43 Va.) 198, 44 Am. Dec. 384; *Daniel* v. *Leitch,* 13 Gratt. (54 Va.) 195, 212-213; *Watson* v. *Hoy,* 28 Gratt. (69 Va.) 698, 711.

There is striking resemblance between the case in judgment and that of *Terry* v. *Coles,* 80 Va. 695, 700-702; indeed, the two cases are not distinguishable in principle. In the latter case it was held: "Sale made by order of a court of competent jurisdiction, *pendente lite,* is a judicial sale. An executor having authority under the will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and to report it to the court for confirmation; whereupon he makes and reports the sale to the court as ordered, such a sale is a judicial sale."

These cases sufficiently illustrate the controlling principles involved in this case, and render the further review of the authorities unnecessary.

Upon the whole case, we think the decree of the corporation court was plainly right, and it must be affirmed.

Affirmed.

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Syllabus.

Richmond.

VIRGINIA LUMBER AND EXTRACT COMPANY v. O. D. MCHENRY LUMBER COMPANY.

November 15, 1917.

1. LEASE—*Description of Personal Property—Apparatus.*—A lease of lumber lands and a sawmill plant with an option to lessee to purchase the leased premises at a specfied price, described the personal property conveyed as cars, engines, machinery and apparatus, then or thereafter placed on the real estate.

   Held: That, the lease covered the entire lumber plant, including all of the property on the premises that was necessary to the operation of the plant, and none other. That is, such property as in the ordinary operation of such plant in the way that this was operated, would be considered as a part of the outfit for its operation. Thus, the following articles passed: A locomotive engine and logging cars; tools, implements and appliances, in use in operating the plant at the time of the lease; furniture, tools and equipment used in camp, shops, barns, office, etc., in actual use at the time of the lease. But supplies held in store for replacement or repairs of machinery and tools did not pass; nor foodstuffs, provisions and medicines for employees and horses, nor the horses used in hauling and work at the plant.

2. APPEAL AND ERROR—*Commissioner's Report—Weight to be Attached to.*—The report of a commissioner in chancery on the value of property, on conflicting evidence, sustained by the circuit court, cannot be properly overruled on appeal. The report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight and should not be disturbed unless its conclusions are clearly at variance with the evidence.

3. LIMITATION OF ACTIONS—*Burden of Proof.*—Where the statute of limitations is pleaded, the burden is upon the party pleading the statute to show by a preponderance of the evidence that the cause of action arose more than the statutory period before the suit was brought.

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Appeal from a decree of the Circuit Court of Botetourt county. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Caskie & Caskie, for the appellant.

Haden & Haden, for the appellee.

KELLY, J., delivered the opinion of the court.

The appellee, O. D. McHenry Lumber Company, being the owner of a tract of land upon which it was operating an extensive sawmill plant, on the 1st day of March, 1910, executed a deed of trust upon the land and plant. In that deed the description of the property concluded as follows: "Together with all mills, houses, buildings, structures, railroads, tramways, logging roads, cars, engines, machinery and apparatus of every kind and character (except public roads and rights of way and other property and appurtenances of railroad companies) now or hereafter built or connected with, or placed on, the real estate hereinbefore described, or any portion thereof, with all the appurtenances thereto, and all other lands, timber, timber rights, and rights of way of the company in the counties aforesaid.

"It is the true intent of the parties hereto that this instrument shall convey the above described property, together with all buildings, structures and improvements of every kind and character which have heretofore been or may hereafter be placed upon said mortgaged property."

After the execution of the deed of trust, the company remained in possession and continued to operate the plant until the 22nd of December, 1911, when it executed a five year lease of the entire property to one E. W. Mulligan,

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with an option to Mulligan, at any time before the expiration of the lease, to purchase the leased premises at a specified price. This lease was made for the benefit of the appellant, Virginia Lumber and Extract Company, and was duly assigned to it. The deed of trust is material to the case because, and only because, the description of the property as contained therein determines the property embraced in the lease. There is a slight variance in this respect between the deed and the lease, but this was manifestly accidental and unintentional, and the terms of the lease as a whole leave no room to doubt that the parties intended the lease to cover the identical property which was included in the deed.

The appellant at once assumed possession, and operated the plant under the lease until March, 1915, when it notified the appellee of its intention to avail itself of the option and purchase the property.

The primary question in this litigation is whether certain personal property situated on the premises at the date of the lease taken into possession and use by the lessee and now claimed by it as purchaser, was intended to be included in the lease, and, of course, in the sale also if the option to buy should be exercised. The appellant being a nonresident corporation, the appellee brought an attachment suit in equity seeking to recover the value of the personal property which it alleged the appellant had thus wrongfully converted to its own use.

The cause was referred to Commissioner C. M. Lunsford, and he made a most excellent report upon the various questions referred to him. This report was excepted to on various grounds by both the appellant and the appellee, but all the exceptions were overruled, and a decree was entered in favor of the complainant in accordance with the finding of the commissioner for the value of such personal property taken and claimed by the appellant as was held not to be embraced in the terms of the lease.

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From this decree the appellant, which denies liability in any amount, obtained this appeal, and the appellee which claims a much larger sum than the decree awarded, assigns cross-error.

The construction of the lease is not free from difficulty, but with due regard for the rule that it must be construed most strongly against the lessor, as well as for the fact that the parties both understood that the lessee intended to operate the plant and would be likely to have immediate use for the personal property here in dispute, we are of opinion that Commissioner Lunsford has correctly interpreted the meaning of the instrument with reference to the property embraced therein, and we feel that we cannot do better in disposing of this branch of the case than to quote from his report, as follows:

"As it will be necessary for the court in this case to construe the lease to determine whether the property claimed here passed to the lessee under the lease, it is proper to state the character of the several classes of property on the account, so that the court can say whether, in the event some of the property does not come under the language of the lease, there are any portions thereof that do. Therefore your commissioner deems it pertinent to divide the property on these lists into such classifications that in the event the court should not approve the findings of your commissioner as to this property, a decree can nevertheless be entered without a further reference. None of this property is affixed to the freehold or attached to the soil so as to become real estate, but was all, either in use, or for use, in the operation of the plant and the conducting of the business of manufacturing and shipping lumber. It is, however, used in different ways, and is of different character and uses. It may be properly divided into six classes, as follows:

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"1. The articles listed in exhibit 'C' being, one locomotive engine and thirty logging cars, charged at $4,300.00.

"2. Tools, Implements and Appliances, in use in operating the plant at the time of the lease, namely: (1) The articles under the head of 'Railroad Grading Tools' charged at $37.65. (2) The articles under the head of 'Logging Tools' charged at $218.71.

"3. Furniture, Tools and Equipment used in camp, shops, barns, office, etc., in actual use at the time of the lease, and listed as follows: (1) The articles under the head of 'Camp Barn' except the horses and medicinal articles, charged at $433.60. (2) The articles under the head of 'Office Furniture and Fixtures,' charged at $165.00. (3) The articles under the head of 'Camp Furniture and Fixtures,' charged at $259.72.

"4. Supplies held in store for replacement or repairs of machinery and tools. (1) The articles under the head of 'Extras at Mill' charged at $1,323.41. (2) The articles under the head of 'Blacksmith Shop Supplies,' charged at $33.49. (3) The articles under the head of 'Camp Blacksmith Shop,' charged at $19.03.

"5. Foodstuffs, provisions and medicines for employees and horses. (1) Articles under the head of 'Camp Supplies' charged at $157.00. (2) Foot-oil, salt, powders, liniment, acid and turpentine, under the head of 'Camp Barn' charged at $10.65.

"6. Horses used in hauling and work at the plant. (1) The six horses under the head of 'Camp Barn' valued at $1,140.00.

"Counsel have requested your commissioner to state the account between the plaintiff and defendants, and show what, if anything, is due to the plaintiff on account of the property sued for in this cause, in addition to the questions specifically referred and from whom. In order to state the account as requested, it will first be necessary to state

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what, if any, of the property sued for passed to the lessee under the lease. As has been stated, the lease by express terms embraced all the property that was conveyed by the trust deed, and the question here is, if default had been made by which the trustees in the deed of trust had been called on to sell the property conveyed by that deed, could they have sold any or all of the property here sued for?

"The only words in the deed of trust (and they are the same in the lease) that relate to personal property, are: 'cars,' 'engines,' 'machinery' and 'apparatus.' And this is confined to such as was then or thereafter 'placed on' the real estate. By the term, 'placed on the real estate,' it is contended that the property must be so attached to the soil as to constitute a part of the real estate, but in this view I do not concur. Much of the machinery and apparatus for the operation of a lumber plant must of necessity be separate from the real estate. The word 'apparatus' is perhaps the most comprehensive word employed, and is defined by Webster to mean: '1. Things provided as means to some end. 2. A full collection or set of implements, or utensils, for a given duty, experimental or operative; any complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery, mechanism.'

"Your commissioner construes this lease to cover the entire lumber plant, including all of the property on the premises that is necessary to the operation of the plant, and none other. That is, the property that, in the ordinary operation of such a plant in the way this was operated, would be considered as a part of the outfit for its operation.

"Applying these principles I would find that the articles under Class 1, above, passed under the lease as they are all comprehended under the terms: 'cars and engines,' used in the lease, and were at the time in use in the operation of the plant. The articles under Class 2, being tools used in

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the work of operating the plant, and necessary for that purpose, I think, passed under the lease under the designation, 'apparatus.' The articles under Class 3, I think also passed under the lease. While it is true that this was largely household furniture, yet it was part of the equipment of a lumber plant, necessary to its operation in the manner it was then being operated, and must likewise fall under the designation in the lease of 'apparatus.' The articles under Class 4 were not in use in the plant, but were mere stores of such articles as would be needed to replace any parts of machinery that would break or wear out. They were in no sense a part of the 'apparatus' provided for the operation of the plant, but for repairs to the plant when needed. I think these articles did not pass under the lease, but should be paid for. This view is emphasized by the express provision of the lease found in paragraph 16 as follows: 'The lessee, party of the second part, accepts the property in its present condition and agrees to pay for all repairs or replacements which may be necessary during the life of this lease, and turn over the property at the expiration of the lease in good condition, ordinary wear and tear excepted.' The articles under Class 5, being foodstuffs and provisions for the men, were certainly no part of the plant, but constituted a part of the expense of operation, and certainly under no reasonable construction could pass under the lease, and being used by the defendant should be paid for. The horses under Class 6 constitute a different species of property entirely from machinery and apparatus for a lumber plant. I do not think they pass under any designation used in the lease. and therefore should be paid for. While Mr. Roberts testified that he insisted that the horses go in with the other property, yet I do not find that there was any agreement to that effect. but as before stated. both parties stood on the language of the lease."

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With reference to the value of the property, which, as fixed by the report, is also the subject of exception by the appellant, the evidence is conflicting, but most of it was taken before the commissioner, he has gone into it carefully, the circuit court has sustained his finding, and, upon a review, we are satisfied that we could not properly overrule the report in this respect.

"It is a familiar rule, many times emphasized in the decisions of this court, that the report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight and should not be disturbed unless its conclusions are clearly at variance with the evidence." *Cottrell* v. *Matthews*, 120 Va. 847, 92 S. E. 808, and cases cited.

The remaining question to be disposed of, raised first by an exception to the commissioner's report and later by the answer of the appellant filed after the report was made, is whether the appellee's claim is barred by the statute of limitations. The commissioner does not advert to this question in his report and probably did not have it called to his attention, but the following statement by him has a direct bearing upon the inquiry:

"During the preliminary conversations among the parties, and before the lease was signed, O. D. McHenry called the attention of the gentlemen, or some of them, who were representing the lessee, to the fact that his company had considerable personal property on the premises that he would like to sell to the lessee, and exhibited the list or inventory referred to for their inspection. They promptly declined to agree to pay for any property, but insisted that all of the property on the premises went with the lease, and that the terms of the lease as drawn included it. None of them examined the list, nor was there any discussion about prices. O. D. McHenry in his deposition says that not over thirty seconds was consumed in reference to this

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inventory. Just what did take place, or what was said does not clearly appear, and on this matter the evidence is conflicting, but from all the evidence it does appear that the O. D. McHenry Lumber Company, Incorporated, claimed that this property did not pass under the language of the lease, while the gentlemen who represented the Virginia Lumber and Extract Company claimed with equal emphasis that it did. Each party was then and there before the lease was signed put on notice of the claim of the other, yet neither made or suggested any effort to settle the matter by the employment of other language in the lease about which there could be no dispute, nor to agree upon the construction of the language already employed. They stood at arm's length, each relying on the proper construction of the lease to sustain their respective contentions. The lease had been prepared some time before the 14th of December, 1911, and handed to O. D. McHenry by John G. McHenry to be submitted to the stockholders' meeting of the O. D. McHenry Lumber Company, Incorporated, for approval. A meeting of this company was held on the 14th of December, 1911, and after making a slight change, approved it and authorized the board of directors to have it executed. It does not appear in evidence, but from the evidence it may well be inferred that the reason there was no attempt to make the language more explicit in the lease when it came to be executed or to settle the question about the property in dispute, was that both parties wanted to make the lease, and to make any change in its wording would require that it be again submitted to a meeting of stockholders of the McHenry Company, and it was not certain that the change would be approved unless it conformed to their view, and the lessees preferred to stand on the wording in the lease rather than risk another stockholders' meeting. Whether this be correct or not, no effort was made to settle the dispute at that time, but it was left open

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for adjustment later. While the matter was several times brought to the attention of the lessee by the officers of the lessor, after the execution of the lease, the matter was never pressed to a conclusion by either side, and no agreement about it was ever reached. * * * It was understood that the claim applied to certain personal property on the premises, and it does not from this record appear that any request was made for an itemized statement of the account, or effort to ascertain the value of the property in dispute.

"Immediately after the execution of the lease the lessee took possession of all of the property sued for in this suit along with the lumber plant at Arcadia as if the same was embraced in the lease, and openly appropriated it to its own uses, and, what has not been consumed in the use, it now holds, claiming that it has the absolute ownership thereof under its deed by reason of the purchase under the option."

It is conceded that three years is the period of limitation applicable to the cause of action asserted in the appellee's bill. The appellant took possession of the leased premises, including the property in dispute, in December, 1911, and it claims that the cause of action, if any, arose then and was therefore barred when this suit was brought in July, 1915. But the appellee, while conceding that the appellant, when the lease was delivered and possession was taken thereunder, claimed that the property in dispute passed to it under a proper construction of the lease, contends that this question of construction was expressly left open for future determination after further consideration of it on the part of the appellant, and that, thereafter. while neither party waived any rights as to the construction of the contract, the appellant used the disputed property with the acquiescence and permission of the appellee until on or about January 1, 1913. when it terminated the situation by a final refusal to pay and a decisive denial of the appellee's claim

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to the property, thus for the first time, in contemplation of law, converting the same to its own use. If this be true, then of course the cause of action did not arise until the last named date. See 4 Min. Inst. (3d ed.) 437-8, 543-5: Burks' Pl. & Pr. 244; Wood on Limitation (3d ed.), section 183; *Logan County Nat. Bank* v. *Townsend,* 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 109, 112.

The evidence is in conflict upon this point, but viewed as a whole it tends very strongly to support the appellee's contention. It is argued that the facts found in the report of the commissioner sustain the appellant's contention and show that its possession of this property was adverse from the beginning. We think the contrary is true, in so far as the report bears upon the question. The commissioner, as we have seen, did not appear to have the question of limitation before him. The statement from him which we last quoted was manifestly made with a view to showing that neither party was estopped by any conduct on its part from setting up the construction of the lease contended for by it, and not with any reference to the statute of limitations. He certainly could not have meant to indicate that the claim was barred, else he would not have reported favorably, as he did, upon a part of it. He does say that the appellant immediately after the execution of the lease took possession of the property in question and "openly appropriated it to its own uses," but this statement is qualified and explained by the words, "as if the same was embraced in the lease," occurring in the same sentence. Everything in the commissioner's report, and everything contended for by the appellee as to the circumstances and arrangement under which the appellant took and used the disputed property, is consistent with the right of both parties to stand upon their respective constructions of the lease; and appellee's contention is strongly corroborated, if not conclusively confirmed by the commissioner when he says that "no ef-

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fort was made to settle the dispute at that time, but it was left open for adjustment later." We have carefully read the testimony of the witnesses, and to say the least that can be said of the question from the appellee's standpoint, the appellant has not shown by a preponderance of the evidence that the cause of action arose more than three years before the suit was brought; and the burden was upon it to do so. *Goodell* v. *Gibbons*, 91 Va. 608, 612, 22 S. E. 504.

Having reached this conclusion, it becomes unnecessary for us to decide whether the appellant, a foreign corporation, could under the facts in this case, be permitted to plead the statute of limitations.

With reference to the cross-error assigned by the appellee, it is sufficient to repeat that, in our opinion, the commissioner correctly construed the lease as to what personal property was and what was not embraced therein, and the cross-error is, therefore, without merit.

The decree complained of is right in all respects and will be affirmed.

Affirmed.

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Syllabus.

Richmond.

VIRGINIA PORTLAND CEMENT COMPANY v. SWISHER'S ADMINISTRATOR.

November 15, 1917.

1. NEW TRIALS—*Verdict Contrary to the Law and the Evidence—Conflicting Evidence.*—Upon a motion to set aside a verdict as contrary to the law and the evidence, the court cannot undertake to substitute its judgment for that of the jury, even in cases where it thinks the judgment is not sustained by the weight of the evidence, if there be any serious conflict in it.

2. MASTER AND SERVANT—*Death of Servant—Instructions—Assumption of Risk—Duty of Master—Instructions Read Together.*—In an action against a master for the death of his servant through negligence, the jury were instructed that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place for the servant to work in, and that if the defendant failed in this, and if such failure was the immediate and sole proximate cause of the servant's death, they must find for the plaintiff; and that, while an employee assumes all risks naturally incident to his employment, yet this does not relieve the master from the duty of using reasonable care and diligence in providing a reasonably safe place for the servant to work in, and if the jury believes that the master did not use ordinary care to provide such a place, and that such failure was the sole proximate cause of the injury complained of, the defendant was liable. Another instruction restated these propositions and told the jury that if the master failed to maintain a reasonably safe place, and that he knew or ought to have known it in the exercise of reasonable care, and that such failure was the cause of the injury complained of, he was liable. While admittedly correct statements of abstract propositions of law, it was objected to these instructions that they were defective, in that they overlooked the fact that there could be no recovery if the negligence of the defendant was within the risk assumed by the plaintiff. If there is any force in this objection it had no application in the instant case, as another instruction which, on its face, told the jury that it was

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to be read in connection with the instructions set out, told the jury that they were not to find for the plaintiff if they believed from the evidence that the accident occurred through any risk, assumed, and that an employee does assume all risks incident ordinarily to the service and those known to him, or so obvious as to be readily observed by him. This addendum to these instructions, it is believed, covers fully all of the objections suggested.

3. MASTER AND SERVANT—*Instructions—Ordinary Care—Instructions Taken Together.*—In an action against a master for the death of a servant, the court instructed the jury that if they believed from the evidence that the plaintiff's death was due to a defective step, "and that the master, as in said instructions defined, had or should have had knowledge thereof," the master was liable. It was objected to this instruction that it should have said, that in order to make the master liable he, in the exercise of ordinary care, must have had, or should have had, such knowledge.

Held: That, there was no force in this objection, as the instructions specifically ordered to be read in this connection, told the jury that the master was only reuired to exercise ordinary care.

4. INSTRUCTIONS—*Not Based on the Evidence.*—It is not error to refuse an instruction where the evidence does not sustain it.

5. MASTER AND SERVANT—*Safe Place to Work—Inspection—Obvious Defects.*—Steps used by a servant at his place of work were unsafe, both on account of the lack of a hand-rail and from the fact that a step was imperfectly nailed. The servant reported to his master that there was no railing on the steps, which was an obvious danger, but did not report that the step was imperfectly nailed, which was not an obvious danger and which could not have been discovered by the servant, except upon an inspection, which the evidence did not show was the servant's duty to make.

Held: That, it was the master's duty to inspect the steps and the servant had a right to assume that this duty had been performed, and not unless the defect was an obvious one was he charged with negligence in failing to report, or with any assumption of risk incident thereto.

6. MASTER AND SERVANT—*Safe Place to Work—Steps.*—One who uses steps may assume that all parts of them are safe. He is not required to walk in the middle of them.

7. INSTRUCTIONS—*Application to a Particular Fact.*—An instruction as given contained a full statement of the law applicable to a certain phase of the case. As it was the duty of the jury to apply the law thus stated to the facts, it was unnecessary to

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go further and say to them that the law, in addition to its general application, was also applicable to some particular fact.

8. MASTER AND SERVANT—*Instructions—Appeal and Error.*—An instruction in effect told the jury that, after a servant had called his master's attention to a particular danger at his place of work and was told by the master that he must continue to work, and that when other work that was then in progress was completed this particular danger would be removed, if the servant continued to work in these circumstances, so far as this particular danger was concerned, he continued at his own peril.

Held: That, this instruction went as far as the court could go upon the master's theory as to this particular danger. Whether it did not go too far in that respect was a question which the appellate court did not decide, because it was given at the instance of the appellant.

9. MASTER AND SERVANT—*Safe Place to Work—Promise of Master.*—Where the master promises or gives the servant reasonable ground to infer or believe that a defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise or assurance as would be reasonably allowed for its performance, unless the danger is so palpable, immediate and constant (of which there is no evidence in this case) that no one but a reckless person would expose himself to it, even after receiving such promise or assurance.

10. MASTER AND SERVANT—*Safe Place to Work—Promise of Master.*—A servant met his death from a fall from an unrailed stairway, by reason of a step being defectively nailed. The evidence showed that a few days before the accident the servant had complained of the absence of a hand-rail and had asked his foreman to make this stairway safe and the foreman had told him to go on with his work and that the place would be fixed as soon as possible.

Held: That, in these circumstances, an instruction telling the jury, as a matter of law, that the servant assumed all the risks incident to the lack of a railing at the point in question, would have been erroneous, and that, under the evidence it was a question for the jury (upon proper instructions) whether the servant assumed the risk, or exercised due care in remaining in the master's service, relying upon the promise to provide a hand-rail.

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Error to a judgment of the Circuit Court of Augusta county, in a proceeding by motion for a judgment for damages. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

A. C. Gordon and *D. Lawrence Groner*, for the plaintiff in error.

Curry & Curry and *Timberlake & Nelson*, for the defendin error.

WHITTLE, P., delivered the opinion of the court.

The judgment under review was rendered upon the verdict of a jury awarding damages to the defendant in error for the wrongful death of his intestate imputed to the negligence of the plaintiff in error in whose employment Swisher was at the time he was killed.

The following narration tells the story of his death: The plant of the plaintiff in error is a large manufacturing establishment comprising a number of mills and is equipped with machinery, belting and appliances of various kinds employed in grinding the material used in the production of hydraulic cement. Swisher had been in the employment of the company for years, and at the time of the accident was working under Strause the head miller. His place of work was in connection with a series of bins into which the cement was deposited by conveyors attached to revolving belting. These bins were located thirty feet above the ground floor of the building; and there were narrow walkways railed in on both sides about three feet above the level of the tops of the bins over which he passed in going from one bin to another in the discharge of his duties in looking after the bins and conveyors. The descent from the walk-

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ways to the bins was by means of a short stairway, attached to and at right angles with the walkways. These steps were three feet wide and the treads two inches thick and eight inches wide, and overlapped the risers some four or five inches at each end. The stairway was wholly unguarded by balusters or hand-rails of any description, although the situation was rendered especially dangerous in the event of any one falling off the steps by reason of the presence of rotating belting and machinery immediately beneath them. There was no eye-witness to the accident, yet the circumstances convincingly point to the cause and manner of it. For instance, shortly after the casualty occurred, it was discovered that the right-hand end of the second tread of the stairway was tilted upward, and an examination disclosed that the nail intended to hold it in position had missed the riser. In other words, it had never been nailed down. Every surface throughout that part of the building was heavily coated with dust from the ground cement, and it had sifted off from the sloping surface of the tread. Directly beneath this point was a six-inch timber, the surface of which showed an imprint in the dust as if made by a man's arm in an attempt to arrest his fall. On the floor below, Swisher's glove and the heel from one of his shoes were found. It moreover appeared that he fell across the first line of revolving belting, which snapped under the force of the contact with a noise that attracted the attention of the workmen in the building. He was precipitated thence to the second line of belting, moving in an opposite direction to the first, and was carried to and cast headlong into a clutch-mill and killed.

The main features of the case are so satisfactorily discussed in the opinion of the circuit court that, with some supplementary observations, we feel justified in adopting it as the opinion of this court.

Holt, J., who presided at the trial, says: "In this case there has been a trial and a verdict of the jury for the plain-

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tiff. This verdict the court is asked to set aside as being contrary to the law and evidence.

"Dealing first with the question of evidence, we are confronted by the familiar principle that the court cannot undertake to substitute its judgment for that of the jury, even in cases where it thinks the judgment is not sustained by the weight of the evidence if there be any serious conflict in it. Without undertaking to discuss it in detail, it is sufficient to say that there is in the record evidence sufficient to sustain the judgment. This exception, is, therefore, overruled.

"We are next to consider what errors, if any, have been committed during the progress of the case.

"None have been urged in argument except those involved in giving or refusing to give certain instructions.

"It is said that the court erred in giving for the plaintiff instructions 3, 4 and 5. These are stock instructions, and it is admitted that they are correct as abstract propositions of law, but it is said that they are defective in that they overlook the fact that notwithstanding negligence may be shown on the part of the defendant, there can be no recovery if the plaintiff himself was negligent, or if the negligence of the defendant was within the risk assumed.

"Instruction 3 tells the jury that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place for Swisher to work in, and that if the defendant failed in this, and if such failure was the immediate and sole proximate cause of the intestate's death, they must find for the plaintiff.

"Instruction 4 tells the jury that while an employee assumes all risks naturally incident to his employment, yet this does not relieve the master from the duty of using reasonable care and diligence in providing a reasonably safe place for the servant to work in, and if the jury believes that the master did not use ordinary care to provide such a

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place, and that such failure was the sole proximate cause of the injury complained of, the defendant is liable.

"Instruction 5 is in effect a restatement of the proposition contained in instructions 3 and 4, and tells the jury that if the master failed to maintain a reasonably safe place, and that he knew or ought to have known it in the exercise of reasonable care, and that such failure was the cause of the injury complained of, he is liable.

"It is admitted, as we have seen, that these instructions, in so far as they embody abstract principles of law, are correct, but it is said that they fail to take note of the doctrine either of contributory negligence or of assumed risk.

"It is believed that the record in this case shows that if no liability attaches, it is due to the fact that the accident was the result of a risk assumed by Swisher, and not because of any positive or contributory negligence on his part, and it was in view of this aspect of this case that the court gave instruction 8. That instruction, on its face, tells the jury that it is to be read in connection with instructions 3, 4 and 5, given on behalf of the plaintiff, and the court in elaborating that idea to the jury stated to them when this instruction was read, that it was to be considered as much a part of each of those instructions as if it had been copied into each of them; it tells the jury that they are not to find for the plaintiff if they believe from the evidence that the accident occurred through any risk assumed, and that an employee does assume all risks incident ordinarily to the service and those known to him, or so obvious as to be readily observed by him. This addendum to these instructions, it is believed, covers fully all of the objections suggested. It is by no means certain that such a qualification was necessary, but it was given out of abundance of caution, and it is believed to be sufficient in that particular.

"It is said that this instruction itself is defective in that it tells the jury that the master is liable if he had, or should

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have had, knowledge of the defective step, when it should have said that in order to make the master liable he, in the exercise of ordinary care, must have had, or should have had, such knowledge. Instruction 8, however, says this: 'If, therefore, you believe from the evidence that the plaintiff's death was due to the defective step, and that the master, *as in said instructions defined,* had or should have had knowledge thereof.' Here the master's duty is the duty in said instructions defined, and said instructions 3, 4 and 5 specifically ordered to be read in connection with this instruction, tell the jury in terms that the master is only required to exercise ordinary care. It is next said that the court should have given instruction F, offered on behalf of the defendant. Undoubtedly the court should have given this instruction if there was evidence to sustain it, but this court is of opinion that the evidence does not sustain it, that it does not show that it was Swisher's duty to report defects in the place where he worked, save such as were open and obvious to him, thereby differentiating this case from the case of *Atlantic, etc., Co.* v. *West,* 101 Va. 13, 42 S. E. 914. He did report that there was no railing on the steps. That was an obvious danger. He did not report that the step was imperfectly nailed, because that was not an obvious danger, and there was nothing to show that it could have been (observed) by Swisher, except upon an inspection. It was not Swisher's duty to inspect these steps, and if, under our practice, the jury could have returned a verdict saying in effect that Swisher's death was due to a defect in this step, in that it was imperfectly nailed, and that such defect should have been discovered by Swisher by an inspection thereof, which he should have made but did not, and for this reason the defendant was not liable, then in that case this court would have had to set aside the jury's verdict. because it would not have been sustained by the evidence.

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"It is said, also, that the court erred in rejecting instruction G, tendered on behalf of the defendant. That instruction proceeds upon the theory that the same duty rested upon Swisher to discover the defect in the step that rested upon the defendant—that their duties in this respect were correlative. This is not the law. It was the company's duty to inspect the steps. Swisher had a right to assume that this duty had been performed, and not unless this defect was an obvious one was he charged with negligence in failing to report, or with any assumption of risk incident thereto.

"The same reasons led the court to reject instruction K, which also proceeds upon the theory that it was Swisher's duty to inspect these steps.

"Instruction I was rejected because it was framed upon the theory that where an employee has two methods of discharging his duties open to him, one safe and one dangerous, he must adopt that which is safe. This proposition of law has no application to the evidence here. One who uses steps may assume that all parts of them are safe. He is not required to walk in the middle of them. Steps not nailed at all are safe if one will always do that carefully, but of course, this is not required. That he should have stood upon the end of these steps and looked over, was something that any man in discharge of Swisher's duties might have been expected to do.

"It is also said that the court erred because it struck from defendant's instruction C the words, "Include the lack of railing at the point in question." This instruction as given contains a full statement of the law applicable to this phase of the case. It was the duty of the jury to apply the law thus stated to the facts, and it was unnecessary to go further and say to them that this law, in addition to its general application, was also applicable to some particular fact. Such statement would also have been misleading for these reasons.

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"Defendant's instruction D dealt with this railing. Whatever may have been the original rights of the parties, it told the jury in effect that after Swisher had called the defendant's attention to this particular danger, he was told that he must continue to work, and that when other work that was then in progress was completed, the railing would be built. This court, in instruction D, said to the jury that such a statement did not constitute a promise, or shift the risk assumed, from Swisher to the defendant. That is to say, the court told the jury that when Swisher continued to work in these circumstances, so far as danger incident to the rail was concerned, he continued to work at his own peril. This was certainly as far as the court could go in this direction. Here the court placed upon Swisher all ordinary risks apparently due to the absence of the rail. There was no misunderstanding on the part of any one, as to the scope of this instruction, and the argument of counsel shows that there was none. It appears from the evidence that the accident did not occur because there was no rail, but because there was a tilting step. Certainly this, in the light of this instruction is, necessarily, what the jury must have believed. The tilting step was not a risk assumed. It was a danger not obvious—a danger that could only have been ascertained by such an inspection as Swisher was not required to make."

With further reference to instruction D, Judge Holt was clearly right in saying that this instruction went as far as the court could go upon the defendant's theory as to the railing. Whether it did not go too far in that respect is a question which we need not decide, because it was given at the instance of the defendant.

The failure of the defendant to rail in the steps from which plaintiff's intestate fell was one of the grounds of negligence alleged in the pleadings. Complaint is made here of the action of the circuit court in amending instruc-

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tion "C," requested by the defendant. The instruction as given told the jury that Swisher assumed all the risks incident to his employment in connection with the work in which he was engaged in the mill room, but eliminated the concluding words, "including the lack of hand railing at the point in question." There was evidence tending to prove that a few days before the accident happened Swisher complained to Sprouse, the mill foreman, of the absence of the hand rail, stating that the place was dangerous, and that if they did not fix it he would quit, that he did not care to risk his life any longer. In reply to Swisher's inquiry, "When are you going to fix these bannisters and walkways on top so a man will be safe in getting around?" Sprouse replied, "Just as soon as we can get to them, we are working up to that point, and as soon as we can possibly get there we will do so. Just go ahead." In these circumstances, an instruction telling the jury, as a matter of law, that Swisher assumed all the risks incident to the lack of a railing at the point in question, would have been erroneous.

The rule is thus stated in *Va., etc., Wheel Co.* v. *Chalkley*, 98 Va. 62, at page 68, 34 S. E. 976, at page 978: "Where the master promises or gives the servant reasonable ground to infer or believe that the defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise or assurance as would be reasonably allowed for its performance, unless the danger is so palpable, immediate and constant (of which there is no evidence in this case) that no one but a reckless person would expose himself to it, even after receiving such promise or assurance."

So in *Riverside Mills* v. *Carter*, 113 Va. 346, 74 S. E. 183, it was held: "The question for the jury to determine is not so much whether the repairs were made within a reasonable time, as it is whether the time which elapsed between the promise to repair and the injury was sufficient to

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put the plaintiff upon notice that the defendant did not intend to make the repairs, thereby shifting again to the plaintiff the risk which the master assumed when he made the promise. If the repairs are not made within a reasonable time after the promise to make them, the servant is in the same position as if no promise had been made—that is, he reassumes the risk."

Under the evidence in the instant case, it was a question for the jury (upon proper instructions) whether the plaintiff's intestate assumed the risk, or exercised due care in remaining in the master's service, relying upon the promise to provide a hand-rail. *Hough* v. *Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Kane* v. *Railway Co.* 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *N. & W. Ry. Co.* v. *Ampey*, 93 Va. 108, 25 S. E. 226; *N. & W. R. Co.* v. *Wade*, 102 Va. 140, 45 S. E. 915; *Va., etc., Wheel Co.* v. *Harris*, 103 Va. 708, 49 S. E. 991; *Trucker's Co.* v. *White*, 106 Va. 147, 60 S. E. 630; *Schwab* v. *Washington Luna Park Co.*, 112 Va. 456, 71 S. E. 542.

We are of opinion that the jury were correctly instructed, and that the judgment under review ought to be affirmed.

Affirmed.

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Syllabus.

Richmond.

VIRGINIA-WESTERN POWER COMPANY v. W. T. KESSINGER AND ANOTHER. VIRGINIA-WESTERN POWER COMPANY v. ANNIE P. KESSINGER AND OTHERS.

November 15, 1917.

Absent, Prentis, J.

1. EMINENT DOMAIN—*Instructions as to Duties of Commissioners.*—In eminent domain proceedings the statute (subsection 6 of section 1105-f, Code of 1904), is sufficiently specific as to what are the duties of the commissioners in the premises, and if the orders of court, appointing commissioners substantially contain instructions as to what all of such duties are as prescribed by statute, as they did in the instant case, that is sufficient; and the trial court may, and properly should, refuse to give any further instructions defining what such duties are. But as to the manner in which the commissioners should discharge their statutory duties, it would be helpful to the commissioners and greatly tend to the proper discharge of their duties if the courts appointing them would, on their own motion, or upon request of any party to the case, instruct the commissioners as to what character of testimony and argument or statements of counsel are admissible or inadmissible before them; and caution them not to discuss the case in any aspect of it with any one other than among themselves or allow it to be discussed in their presence, except when together assembled for and engaged in the discharge of their duties in public as commissioners as the statute provides.
2. EMINENT DOMAIN PROCEEDINGS—*Notice to Commissioners of Their Appointment.*—The practice of counsel in a case notifying the commissioners of their appointment in condemnation proceedings should be discontinued. The notice of their appointment and of the date fixed for the view, should be communicated to the commissioners (or to the minimum number authorized to act, if only such number is desired to act), by the clerk or other disinterested person, as the order of court may especially direct by consent of all parties to the case, or

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in the absence of such consent by a certified copy of the order being delivered to the commissioners by the sheriff of the county or sheriff or sergeant of the city in the court of which the proceedings are had.

3. EMINENT DOMAIN—*Entertaining Commissioners—Case at Bar.*—In eminent domain proceedings counsel for the land owners arranged with the husband of one of the landowners for the entertainment at dinner of the commissioners and counsel at his house, before viewing the premises or making a report of their findings. This arrangement became known to at least two of the commissioners before the arrival of the senior counsel for the corporation seeking to condemn the land. Upon the arrival of the senior counsel for the corporation, counsel for the land owners informed him that the husband had been directed "to prepare dinner for everybody who was there if it was agreeable to him." The senior counsel replied that he was very glad that this had been done. Counsel for the corporation when he consented to the arrangement was unaware of the decision in *New River, etc., Railway Company* v. *Honaker*, 119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132.

Held: That, there was error in the action of the trial court in overruling an exception on the part of the corporation to the report of the commissioners, on the ground that they had been entertained by the land owners.

4. EMINENT DOMAIN—*Entertaining Commissioners—Case at Bar.*—If prior to the possibility of any information of it having reached any of the commissioners, the land owners or their counsel had conferred with the company or its counsel on the subject, and the company, in person or by counsel, had consented to the entertainment being given, a different case would be presented, to which the rule in *New River, etc., Railway Company* v. *Honaker*, 119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132, might not apply.

5. EMINENT DOMAIN — *Entertaining Commissioners — Estoppel — Case at Bar.*—As counsel for the company had but scant time for reflection and besides did not then know of the recent ruling in *New River, etc., Railway Company* v. *Honaker*, 119 Va. 641, 89 S. E. 960, Ann. Cas, 1917C, 132, it would not be just or right to apply any rule of estoppel or waiver in the instant case.

Error to a judgment of the Circuit Court of Botetourt county, overruling plaintiff's exceptions to a commissioner's report in proceedings to condemn land.

Reversed.

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STATEMENT OF THE CASE AND FACTS.

These two causes are proceedings under the statute by the plaintiff in error, a public service corporation (hereinafter referred to as power company), to condemn an easement or right of way for an electric transmission line of the power company across the land of the defendants in error (hereinafter referred to as land owners), including the right of ingress to and egress from such right of way.

There was a view and report of commissioners appointed by the court below acting under the statute on the subject. There were five exceptions taken by the power company to such report, which are made the ground of the assignments of error before us. These five exceptions were as follows:

"(1) Because the commissioners were not properly instructed as to the elements of damage they were to take into consideration."

"(2) Because of improper statements of counsel for the condemnees made before the commissioners while viewing the premises and before their report was signed."

"(3) Because the commissioners, before viewing the land or making their report were interviewed and talked to with reference to the matters they were to pass upon and the findings they were to make, by counsel for the condemnees."

"(4) Because the commissioners were entertained and treated by the condemnees before viewing the premises or making the report of their findings."

"(5) Because the compensation fixed and the damages allowed by the commissioners are grossly excessive and can, in no sense, be regarded as 'just' as contemplated by the statute."

As, in the view we take of the causes, there was reversible error in the action of the court below upon the fourth exception to said report. it will be unnecessary for us to consider the second or fifth exceptions above noted, since it is

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not likely that the statements of counsel before the commissioners on their view which were excepted to, will again occur, and the damages allowed may not be the same on a future view of commissioners.

We deem it proper, however, to make some observations touching the first and third exceptions aforesaid, and we feel constrained to reverse these causes upon the fourth exception aforesaid, and, hence, the material facts bearing upon such exceptions will be stated.

THE FACTS.

1. With reference to the first exception to the report of the commissioners:

The orders in these causes appointing the commissioners aforesaid contained, substantially, instructions as to all of their duties which are prescribed by statute (subsection (6) of section 1105-f, of Pollard's Code of Virginia).

No other instructions were asked of the court below.

2. With respect to the third exception to the report of the commissioners:

(a) Both counsel for the power company and counsel for the land owners communicated with the commissioners after their appointment by the court, notifying them of their appointment and urging them to attend the view. Counsel for the power company had such communication by letters written to the commissioners, counsel for the land owners had such communication by letters to some of the commissioners and in person with others of them. The evidence does not disclose that counsel on either side intended to or did go beyond such mere notification and request of the commissioners. But suspicion was aroused by the verbal private communications of counsel for the land owners with commissioners after their appointment, and there was a misun-

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derstanding of what was said by such counsel to two of the commissioners and one of such commissioners himself, at one time, misunderstood what was thus said to him.

(b) With respect to a statement made by counsel for the land owners to one of the commissioners on the morning of the day of the view of the land, the facts are these:

Mrs. Penn owned one of the tracts of land affected by said right of way and an undivided half interest in the other. Mrs. Annie P. Kessinger owned the other half interest in the latter tract. Prior to the condemnation proceedings the superintendent of the power company reached an agreement with and obtained a deed from such owners of such land, purporting to convey said right of way over both tracts of such land for the consideration of $364.52, plus compensation for whatever damage might be done by the construction of the line. The amount of the latter was to be settled by arbitration in case there was failure of mutual agreement thereon. There was such failure of agreement. Two arbitrators were selected who met but were unable to agree on such damages. Pending the action of such arbitrators, it developed that Mrs. Penn was *non compos mentis*. This resulted in an understanding that the power company would not rely upon said deed, but would convey the right of way back to said owners and would proceed under the statute to obtain same by condemnation proceedings, reserving, however, the right to use the right of way meanwhile, without prejudice, until the title could be obtained by such proceedings. Accordingly such a conveyance back to such land owners was executed on September 11, 1916. The power company promptly instituted the said condemnation proceedings; the commissioners were appointed by the court as aforesaid; October 25, 1916, was fixed in the order of court for the view of the land by the commissioners, and they accordingly met at Springwood, the railway station

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near the residence of the said land owners, on such last named date. Counsel for both sides also attended such meeting.

Pending the said occurrences, and prior to October 25, 1916, the power company had proceeded with the construction of its said line and had completed such construction across the said two tracts of land.

The train bringing the senior counsel for the power company being somewhat late, such counsel did not arrive at said place of meeting of the commissioners on October 25, 1916, until some time after the commissioners and other counsel had arrived. While awaiting the arrival of the said senior counsel for the power company, one of the commissioners, seeing that the said line was already constructed on the land before the commissioners had acted, asked one of the counsel for the land owners how that had occurred, and this commissioner, in his testimony on the subject, says that said counsel for the land owners replied to his enquiry and "told (him) how the line had been built and no commission on it;" that in such reply such counsel stated that "the power company had bargained with Mrs. Penn for a right of way," and "agreed to pay $500.00" for it as witness "understood" counsel to say; that said counsel "went on to say why the parties were not satisfied with the damage that Mrs. Penn had agreed to take, from the fact that her mind was not altogether right; that she was not capable of making a contract;" that such counsel did not say that the land owners were not satisfied with the amount that had been agreed upon; that such counsel did not say a word in that statement to witness as to "what amount he thought ought to be allowed" the land owners; and that neither of counsel for the land owners (there being two) made any statement to witness "endeavoring to influence" him.

The counsel for the land owners who replied to the enquiry of the commissioner aforesaid testified "I have no

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recollection of the conversation with" (the commissioner) "but I do not doubt that it occurred because" (the commissioner) "is a man who would not make any statement on a subject that was not correct. He, however, must be clearly mistaken about the amount that I told him was the consideration of the conveyance, because I knew then the amount was less than $500.00 and it is inconceivable that I would have said to him that it was $500.00 when I knew that it was not."

The damages done by the construction added to the said $364.52 might easily have made the total damage, which the power company agreed with Mrs. Penn to pay, amount to $500.00 and this was doubtless the conclusion of the commissioner referred to, from a correct explanation to him by counsel of the land owners of what had occurred.

3. With respect to the fourth exception to the report of the comissioners:

The facts are that feed for the horses of the commissioners who came by private conveyance was furnished by the land owners and such horses were put away and fed by such commissioners in the stable or on the premises of the land owners while the commissioners were taking dinner, before they viewed the land. That all of the commissioners as well as all counsel, both for the power company and land owners, were entertained by the land owners at dinner and with cigars following it, before the commissioners proceeded with the view of the land.

As bearing on the question of whether the case is taken from under the ruling of this court on the subject in *New River, etc., Railway Co.* v. *Honaker,* 119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132, the following is a summary of the material facts:

These condemnation proceedings were friendly in their nature. Many of the steps in the proceedings were taken by mutual consent of the parties on both sides, by counsel.

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At the meeting of the arbitrators above referred to, not long before (which was at Springwood in the same vicinity with the place of meeting of said commissioners), the arbitrators and parties were engaged all day until late in the afternoon and did not get anything to eat or have their horses fed, except that crackers from a store there were gotten by one of counsel for the power company for his lunch. There was a place at Springwood (where the commissioners met as aforesaid) where the counsel and commissioners could have gotten dinner for themselves and had their horses fed at a house of entertainment where such entertainment was furnished to the public and where a good table was usually set, but counsel for the land owners did not know about that. It was at the instance of counsel for the land owners that the entertainment aforesaid was furnished and the motive of counsel was solely a hospitable one so far as the commissioners were concerned and to avoid the discomfort they thought would otherwise be entailed upon the commissioners and all of the counsel in the causes, including themselves.

Accordingly, in advance of the day of the view aforesaid, counsel for the land owners told the husband of one of the land owners about the situation that had occurred at the meeting of the arbitrators and that such a condition ought not to exist among gentlemen, such as were involved in these causes, and that he ought to have dinner prepared for the commissioners and for counsel for the power company and all of its officers who might be present, for counsel for the land owners and for the witnesses who might be there. The husband aforesaid objected to doing this, on the ground that his wife's health was not as good as it ought to be and that it was a good deal of labor to get dinner for such a crowd, but counsel for the land owners insisted that there was no place for these people to get anything to eat, that they lived a long distance away and they ought to have their

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horses fed and have something to eat; but told the husband that none of them would take dinner unless all took dinner. The husband then undertook to prepare for and give the entertainment, which was accordingly given, as aforesaid.

No information was given to counsel for the power company in advance of the day of the view that such entertainment was proposed nor was their consent thereto asked before that day or before the arrival of the commissioners and all of counsel at Springwood on such day, October 25th, aforesaid.

While the commissioners were at Springwood during the morning of the day of the view awaiting the belated arrival of senior counsel for the power company, the evidence tends to show that, through information not derived from counsel for the land owners, at least two of the commissioners became aware of the fact that said entertainment had been provided for them and all present by the land owners. The presumption under the circumstances is that such fact became generally known to the commissioners and others that morning before the arrival of senior counsel for the power company. Counsel for the land owners however, did not know of such information having gotten out, and they awaited the arrival of senior counsel for the power company before mentioning the fact, and upon the arrival of the belated counsel for latter, counsel for the land owners met the senior counsel as he was walking from the depot, and walking along with him in a space of some thirty or forty steps before they came to the assemblage of the commissioners and others, stated that the said husband had been directed "to prepare dinner for everybody who was there if it was agreeable to him." The latter replied that he was very glad this had been done. They by that time had reached the assemblage aforesaid and counsel for the land owners announced to the commissioners and others that said husband "had prepared dinner for everybody and everybody was invited to take dinner at his house." The

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question then arose as to whether they would begin work before or after dinner. Counsel for the land owners suggested that they do their work first and eat dinner afterwards. The said husband objected that the dinner would get cold and that he didn't like to keep the women folks waiting. Senior counsel for the power company then suggested that they go and eat dinner first, which was done. The above statement has been taken almost verbatim from the testimony of the senior counsel for the land owners.

The senior counsel for the power company also testified in the case and does not controvert the above. He, however, adds to his statement on the subject the following: "I raised no objection to it at that time. I had no objection to raise. I did not know that the Supreme Court of the State had put its ban upon that kind of procedure. I had confidence in the commissioners, that they would not be influenced by it although we all know that it is a matter of humanity that cannot be helped, I care not how fair or honorable the man may be, that a man cannot get up from a table and go out and put a value upon the land of his host with his host's cigar in his mouth, and do it in such a way as to do absolute justice to all parties concerned. The case which has settled this as a law of the State of Virginia was at that time, so far as I know, in the press, and the first I knew about this case was in the advance sheets of those reports which I had not seen and of which decision I did not know and am willing to put into the record regardless of how it may have affected me with the commissioners, had I known that this was the view that the Supreme Court took of such matters I would have made the objection and given the opportunity for these commissioners to pass upon this under other circumstances than those under which they did."

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F. W. King, for the plaintiff in error.

Haden & Haden, for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The first, third and fourth exceptions above noted will be considered in their order as stated below.

1. In regard to the first (1st) exception, as these causes have to go back to the court below for further proceedings and the same question will probably arise concerning what, if any, instructions the trial court, if asked by either party, should give to new commissioners in such proceedings, we deem it proper to say that we think the statute on the subject (subsection (6) of section 1105-f, Pollard's Code), is sufficiently specific as to what were the duties of the commissioners in the premises, and that if the orders of court, appointing the commissioners substantially contain instructions as to what all of such duties are as prescribed by statute, as they did in the instant case, that is sufficient; and the trial court may, and properly should, refuse to give any further instructions defining what such duties are. A contrary rule would tend to the presentation to trial courts of lengthy commentaries on the statute law involved and the urging of same upon the court for the adoption, and the simple and plain meaning of the statute might be obscured rather than elucidated thereby, and the result might be confusing to the commissioners instead of being helpful to them in informing them of their duties. Not so, however, as to the *manner* in which they should discharge their statutory duties. We think it would be helpful to the commissioners and greatly tend to the proper discharge of their duties if the courts appointing them would, on their own motion; or upon request of any party to the case, instruct

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the commissioners as to what character of testimony and argument or statements of counsel are admissible or inadmissible before them; and caution them not to discuss the case in any aspect of it with any one other than among themselves or allow it to be discussed in their presence, except when together assembled for and engaged in the discharge of their duties in public as commissioners as the statute provides. These commissioners practically discharge the duties of juries, as we had occasion to remark in effect in the case of *New River, etc., Railway Co.* v. *Honaker, supra,* and every precaution should be taken by such commissioners and by the courts to preserve public confidence in their findings. Neither they, however honorable men they may be, by careless and thoughtless disregard of the proprieties, nor others, whether acting designedly or with the purest of motives, should be allowed to so conduct themselves in any way as to cast suspicion upon the integrity of the commission or upon its decisions.

2. In regard to the third (3rd) exception aforesaid:

While we are satisfied that there was no private communication between counsel for the land owners and any of the commissioners which was intended to improperly influence the later or which did so, yet we think the practice of counsel in a case notifying the commissioners of their appointment in condemnation proceedings should be discontinued. It is a position in which counsel should not be put or put themselves. It is a difficult position to fill with absolute absence of some expression which may have or seem to have the ulterior object or effect of inducing a special feeling of favor on the part of the commissioner communicated with toward counsel having the communication and his client, especially when the communication is verbal, and only in a less degree when it is in writing. The notice of their appointment and of the date fixed for the view, should be communicated to the commissioners,

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(or to the minimum number authorized to act, if only such number is desired to act), by the clerk or other disinterested person, as the order of court may specially direct by consent of all parties to the case, or, in the absence of such consent, by a certified copy of the order being delivered to the commissioners by the sheriff of the county or sheriff or sergeant of the city in the court of which the proceedings are had.

3. In regard to the fourth (4th) exception aforesaid:

The causes before us fall within the rule on the subject laid down in the case of *New River, etc., Railway Co.* v. *Honaker, supra,* unless it can be distinguished on the ground that the entertainment of the commissioners in the instant cases was by the free and untrammelled consent of all parties, by counsel.

There are but few things which may not be done in civil causes by consent of all parties who are affected.

If prior to the possibility of any information of it having reached any of the commissioners, the land owners or their counsel had conferred with the power company or its counsel on the subject, and the power company, in person or by counsel, had consented to the entertainment being given, a different case would be presented, to which the rule aforesaid might not apply. But for reasons of public policy which rise above all personal considerations, or considerations of the effect in particular cases, we have no disposition to relax in any degree the rule referred to as heretofore established. And it is manifest that in any case where information has come to commissioners in condemnation proceedings that entertainment has been provided for them by parties to the proceedings before counsel for other parties thereto have been informed of the proposed entertainment and their consent thereto is asked, the latter and their client are not in a position to refuse such consent untrammelled. If they refuse consent they are taking

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an attitude which would inevitably be offensive to the commissioners, because indirectly reflecting upon their integrity. The risk of injurious result is obvious. And since the evidence in the proceedings before us tends to show that the situation predicated in the next preceding sentence existed when said consent was asked as aforesaid, we do not think that the rule referred to should be relaxed in the instant causes, and we feel that to do so would be to establish an unwise precedent. It is true that while counsel for the power company urge this position in the petition and in their brief, they did not take it at the time consent was asked to the proposed entertainment. But counsel was given but scant time for reflection and besides did not then know of the then recent ruling of the court aforesaid, and it seems to us that it would not be just or right to apply any rule of estoppel or waiver of right to such a case.

For the foregoing reasons we are constrained to the opinion that there was error in the action of the trial court in overruling the fourth exception aforesaid to the report of the commissioners for which these causes must be reversed. The judgments complained of will therefore be set aside and annulled and these causes remanded to the court below for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

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Richmond.

WALTERS V. NORFOLK AND WESTERN RAILWAY COMPANY.

November 15, 1917.

1. CARRIERS OF PASSENGERS—*Presumptions and Burden of Proof—Res Ipsa Loquitur.*—The doctrine of *res ipsa loquitur* applies when an accident happens to a passenger who is himself without fault and is caused by a defect in any of those things which the carrier is bound to supply, or is the result of the failure in any respect of the carrier's means of transportation, or the conduct of its servants in connection therewith. Under such circumstances a presumption of negligence arises against the carrier for injuries thus caused.
2. CARRIERS OF PASSENGERS—*Presumptions and Burden of Proof—Res Ipsa Loquitur.*—If an injury happens to a passenger in consequence of the breaking of the vehicle, a defect in the roadway or track, or any of the other appliances owned or controlled by the carrier in making the transit, a *prima facie* case is made for the recovery of damages, and then the carrier must show the absence of any negligence by itself or its servants causing the accident, and that the utmost diligence and observance of duty on its part could not have prevented the injury. In the absence of proof on the part of the carrier to rebut this presumption of negligence, the presumption becomes conclusive.
3. CARRIERS OF PASSENGERS—*Presumptions and Burden of Proof—Res Ipsa Loquitur.*—Where the cause of the injury is plainly outside of the control of the carrier, and has no connection with the machinery and appliances of transportation or the negligence of its servants in operating such instruments of transportation, such accident raises no presumption of negligence on the part of the carrier, and the burden of showing such negligence is upon the party who avers it.
4. CARRIERS OF PASSENGERS—*Presumptions and Burden of Proof—Res Ipsa Loquitur—Case at Bar.*—Plaintiff, an invalid, was injured by a fall while being removed in an invalid's chair from defendant carrier's baggage car by her husband and two friends, assisted by the baggage master. The invalil's chair was no part of the equipment of the company. It was entirely

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under the control of the plaintiff and her friends. Her safety might well have been safeguarded if they had placed a strap or support in front of her fastened to the arms of the chair. That the accident would not have happened if her husband and his friends had not been negligent in lowering the chair was fairly manifest.

Held: That, the doctrine of *res ipsa loquitur* had no application.

5. CARRIERS—*Carriers of Passengers—Invalids.*—A carrier is not required to accept upon its cars, without an attendant, persons who, because of some physical or mental infirmity, are incapable of properly caring for themselves.

6. CARRIERS—*Carriers of Passengers—Invalids.*—If an unattended person, who is so sick, aged or otherwise infirm as to be unable to assist or care for himself, be accepted as a passenger, the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition.

7. CARRIERS—*Carriers of Passengers—Negligence of Carrier's Servant—Question for Jury.*—In the instant case the trial court properly referred to the jury the question of whether or not the baggage master was negligent in assisting plaintiff's husband and friends in lowering her from the baggage car.

8. APPEAL AND ERROR—*Bill of Exceptions—Certificates of Exception.*—Assignments of error as to the overruling or sustaining of objections to the reception of testimony, cannot be considered in the appellate court where they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708).

Error to a judgment of the Circuit Court of Warren county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Charles A. Hammer, for the plaintiff in error.

Downing & Weaver, for the defendant in error.

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PRENTIS, J., delivered the opinion of the court.

This case arises out of the following facts: The plaintiff in error, who was a paralytic, weighed about 200 pounds, and was confined to an invalid's chair, became a passenger on the Norfolk and Western Railway from Hagerstown, Md., to Bentonville, Va., and was injured by falling from her chair while being taken from the train at Bentonville. She had frequently taken similar journeys as a passenger on the trains of the company. On this as well as on many previous occasions, she had been lifted in her chair into the baggage car, and was thus transported to her destination. She was accompanied on this journey in the baggage car by her sixteen year old son and fifteen year old nephew. Before the train reached Bentonville, her husband had secured two of his friends there to assist him in taking the invalid in her chair from the train to the ground. Immediately upon the arrival of the train, these three men appeared at the car door, and the baggage master rolled the chair to the door. The plaintiff having recognized and smiled at her husband, he instructed his friends as to the proper way in which he desired them to render the necessary assistance. The two large wheels of the chair passed out of the open car door and were taken hold of, one by the husband and the other by one of his friends, but the small or pivot wheel at the rear of the chair caught upon the flange or groove which extended from one side of the doorway of the car to the other, upon or in which the sliding door moved. At this time the baggage master had hold of the rear or back of the chair and the other friend had been instructed to take hold of the rear of the chair so as to support it as the small wheel came out of the car. There being some little delay at this point in the movement, it appears that either the baggage master or the friend whose duty it was to catch the chair as it left the car, or both together, lifted the small

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wheel over the flange, and just after that the plaintiff slipped forward out of the chair and was injured. The baggage master died shortly after the accident and hence could not testify.

The testimony as to precisely how the accident happened is slightly conflicting. The theory of the plaintiff is that the baggage master was negligent in permitting the rear or pivot wheel to turn and catch upon the flange of the doorway, and that he lifted the chair over that slight obstruction so suddenly and negligently as to throw the plaintiff out of the chair and cause the injury. The evidence of the two friends who were assisting in the movement does not sustain this view. One of them, Duke, says the accident happened after the chair had been taken out of the car and while it was in charge of her husband and his friends, and that it was caused by their allowing the front of the chair to go down faster than the rear of it. The other, Williamson, does not give any explanation of the accident except that they lowered the front of the chair too rapidly, possibly, because the invalid was too heavy for them. The husband himself, who is the strongest witness for the plaintiff, says, in response to the question, "Where was the baggage man at this time?" (referring to the time when the rear wheel met the obstruction): "He was holding the back of the chair. When it hit that piece of iron there, it turned flatways, and we was carrying it out on a level, but he lifted that chair and it shot me down, as I was off my guard, and it naturally threw the weight on us and shot us down when he lifted the back of that chair, and threw her forward." This is the only testimony in the case tending to sustain the contention of the plaintiff, and in it is the admission of the husband, who had met and taken charge of the plaintiff, that he was "off his guard" at the very time when he should have been most careful, and when nothing should have been done by anyone except what obviously it seemed best to do,

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namely, to elevate the rear wheel and thus to disengage it from the flange of the doorway so that the chair with the invalid might be lowered to the ground.

The case was conducted by the plaintiff's counsel upon the theory that because the plaintiff was a passenger, the defendant owed her the very highest degree of care, and that it was liable for the slightest negligence which human skill, care and foresight could have foreseen and guarded against, and that there was a presumption of negligence from the mere happening of the accident, under the doctrine of *res ipsa loquitur*. He requested the court to instruct the jury to this effect.

While the authorities relied on have been frequently recognized and the doctrine they announce is perfectly well settled and has been frequently enforced by this court, it has no application to this case.

In *Scott* v. *London Dock Co.*, Hurl. & Colt. 3 Exch. 600, which has been followed both in England and America and approved by many text-writers, this is said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

And this in *Richmond Ry., etc., Co.* v. *Hudgins*, 100 Va. 416, 41 S. E. 739: "A presumption of negligence from the simple occurrence of an accident arises where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, or for the management or construction of which he is responsible. *Trans.*

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Co. v. *Downer*, 11 Wall. 129 [20 L. Ed. 160]; *Railroad Co.* v. *Anderson* [72 Md. 519, 20 Atl. 2, 8 L. R. A. 673], 20 Am. St. Rep. 493; *Railway Co.* v. *Locke*, 112 Ind. 404 [14 N. E. 391, 2 Am. St. Rep. 193]; *Hayes* v. *Railroad Co.*, 111 U. S. 228 [4 Sup. Ct. 369, 28 L. Ed. 410]."

The doctrine applies when an accident happens to a passenger who is himself without fault, and is caused by a defect in any of those things which the carrier is bound to supply, or is the result of the failure in any respect of the carrier's means of transportation, or the conduct of its servants in connection therewith. Under such circumstances a presumption of negligence arises against the carrier for injuries thus caused. For instance, if an injury happens to a passenger in consequence of the breaking of the vehicle, a defect in the roadway or track, or any of the other appliances owned or controlled by the carrier in making the transit, a *prima facie* case is made for the recovery of damages, and then the carrier must show the absence of any negligence by itself or its servants causing the accident, and that the utmost diligence and observation of duty on its part could not have prevented the injury. In the absence of proof on the part of the carrier to rebut this presumption of negligence, the presumption becomes conclusive. On the other hand, where the cause of the injury is plainly outside of the control of the carrier, and has no connection with the machinery and appliances of transportation or the negligence of its servants in operating such instruments of transportation, such accident raises no presumption of negligence on the part of the carrier, and the burden of showing such negligence is upon the party who avers it.

In *Fearn* v. *West Jersey Ferry Co.*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366, it is held that "in any event, where the cause of the accident by which a passenger was injured is known as well to the passenger as to the carrier, the pre-

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sumption of negligence which arises from the mere fact of the injury of a passenger while on the carrier's vehicle, has no application, but the passenger must affirmatively show negligence." 5 R. C. L. 74-84.

In *Peters* v. *Lynchburg Traction Co.*, 108 Va. 337, 61 S. E. 745, 22 L. R. A. (N. S.) 1188, in which the plaintiff was injured by a shock while turning off an incandescent electric light lamp which he personally owned, installed and controlled it is said: "But the doctrine of *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff; nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible."

In this case the invalid's chair was no part of the equipment of the company. It was entirely under the control of the plaintiff and her friends. Her safety might well have been safeguarded if they had placed a strap or support in front of her fastened to the arms of the chair. That the accident would not have happened if her husband and his friends had not been negligent in lowering the chair is fairly manifest.

The rule of law applicable under the circumstances of this case is thus stated in 2 Hutchinson on Carriers (3d ed.), section 992: "The carrier is not required to accept upon its cars, without an attendant, persons who, because of some physical or mental infirmity, are incapable of properly caring for themselves. The carrier, it has been said, is under no duty to turn his vehicles into hospitals, or his employees into nurses, for the care of such passengers. But if an unattended person, who is so sick, aged or otherwise infirm as to be unable to assist or care for himself, be accepted as a passenger, the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility as-

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sumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition. And if the passenger should be so unfortunate as to become sick while upon the journey, and in consequence less able to look after himself, he would not thereby be put beyond the pale of care and protection, and it would be the duty of the carrier, if the passenger's condition were made known to him, to give him such care and protection beyond that demanded under ordinary circumstances as would be reasonably practicable with the facilities at hand, without unduly delaying the train, or unreasonably interfering with the safety and comfort of the other passengers." All of these statements are well sustained by the numerous cases cited in the notes to the passage quoted. See also, 4 R. C. L. 1234; *Anderson* v. *A. C. L. R. Co.*, 161 N. C. 462, 77 S. E. 402; *Middleton* v. *Whitridge*, 213 N. Y. 499, 108 N. E. 192, Ann. Cas. 1916C, 856.

In *Croom* v. *Chicago, etc., Ry. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 603, 38 Am. St. Rep. 557, this is said: "If a passenger because of extreme youth or old age, or any mental or physical infirmity, is unable to take care of himself, he ought to be provided with an attendant to take care of him; but if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus volutarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger in view of his mental and physical condition."

In *Railway Company* v. *Salzman*, 52 Ohio St. 558, 40 N. E. 891, 49 Am. St. Rep. 745, it is said with reference to the duty which the company owed to a sick passenger, that it

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was under obligation to take reasonable care of him—such care as was reasonably practicable with the facilities at hand, without unreasonable delay to the train or discomfort to the other passengers. *Denver & P. R. Co.* v. *Fotheringham*, 17 Colo. App. 411, 68 Pac. 978; *Adams* v. *St. Louis, etc., R. Co.* (Tex. Civ. App.), 137 S. W. 437; *Mitchell* v. *Des Moines, etc., R. Co.* (1913), 161 Iowa 100, 141 N. W. 43; *St. Louis, etc., R. Co.* v. *Dobyns* (Okl. 1916), 157 Pac. 735.

The circuit court fully recognized these established and reasonable doctrines of law and instructed the jury as follows:

"1. If the husband of the plaintiff provided for her removal from the train, with her acquiescence and consent, and without any request on her or his part to the agents of the company to remove her, then the railroad company is not responsible for the acts of plaintiff's husband or of such persons as he requested to assist him in so removing her.

"2. If, however, the baggage master, the agent of the railroad company, assisted in the removal of plaintiff from the train and failed to exercise all the precautions which a man of ordinary prudence would have exercised under like circumstances and conditions and his act was an efficient cause in the injury to plaintiff, then if plaintiff herself was without fault, the railroad company is liable to compensate her for the injuries sustained even though the husband and his assistants may have also been guilty of negligence.

"3. The plaintiff herself must not have been guilty of negligence in bringing about her own injury. If the negligence of the plaintiff contributed as an efficient cause to her own injury she cannot recover no matter how guilty of negligence the agents of the railroad company may have been. The burden of proving the contributory negligence of the plaintiff is on the defendant, unless such contributory negligence appears from the evidence introduced on the part of

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the plaintiff herself, in which case the burden is on her to show that she was not guilty of contributory negligence.

"4. The burden of proof is on the plaintiff to show by a preponderance of affirmative testimony that the act of the baggage master was an efficient cause in bringing about the injury to plaintiff, and also to show that such act was negligence; that is, that the said agent of the company failed to exercise the precautions, which a man of ordinary prudence would have exercised under like circumstances and conditions. If the plaintiff has not established this by a preponderance of affirmative testimony, you must find a verdict for the defendant."

From these instructions it appears that the court properly referred to the jury the question of the negligence of the baggage master, and they found a verdict for the defendant.

Under the circumstances of this case, it was the duty of the company to render such assistance to the plaintiff as appeared to be reasonably necessary, and she had the right to call upon its servants therefor. Neither she nor her husband, however, either made any request for assistance, or gave any of the employees of the company, except the baggage master, any opportunity to render such assistance. Indeed, additional assistance, under the circumstances, appeared to be entirely unnecessary, for her husband, who testified that he had frequently lifted her into and lowered her from the train in her chair, had already provided all the aid apparently necessary and commenced the removal immediately upon the arrival of the train at the station. He took charge of his wife, with her acquiescence and approval, before the accident occurred, and neither he nor either of his two friends were selected for the purpose by the company, nor directed or controlled by it at the time of the injury. The jury were properly instructed and could not, under the evidence adduced, have properly found any other verdict.

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The petition also assigns as error the overruling of some objections offered by the plaintiff to the reception of certain testimony offered by the defendant, and to the sustaining of other objections made by the defendant to the admission of certain testimony tendered by the plaintiff. We cannot consider these assignments because they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, page 708). Even if these objections had been properly presented by the record, they would not change the result.

Affirmed.

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Richmond.

WILSON'S ADMINISTRATRIX v. VIRGINIA PORTLAND RAILWAY COMPANY.

November 22, 1917.

1. MASTER AND SERVANT — *Contributory Negligence — Railroad Tracks.*—Plaintiff's intestate was struck and killed by a moving car on the yards of defendant railroad company. Intestate was standing on a track looking intently at the fireman on an engine on another track about eight feet from the track on which he was standing, when he was struck by an empty flat-car, which, without his knowledge, had just previously been cut loose from the engine and shunted into the track on which he was standing, by an operation familiarly known as a flying switch. The fireman and others attempted to warn him of his danger, but he did not seem to understand, and all the witnesses who testified stated that although he was plainly in imminent danger, he was obviously unconscious of it until it was too late for him to save himself. He was familiar with the yard and its operation, and knew that it was a common practice to make flying switches.

   Held: That, if the evidence had ended here, defendant's demurrer to the evidence would have been sustained, as plaintiff's intestate was plainly guilty of contributory negligence.

2. MASTER AND SERVANT—*Injury to Servant on Railroad Track—Last Clear Chance Doctrine.*—But in the instant case the jury might have found from the evidence, which was conflicting, that the brakeman in control of the car which struck decedent, saw decedent in time to stop the car, that decedent's attitude plainly indicated that he was unconscious of his danger and would be struck unless the car was stopped before it reached him, and that the brakeman's failure to do what a reasonably prudent man would have done under the circumstances was the proximate cause of the accident. Accordingly, the demurrer to the evidence ought to have been overruled.

3. NEGLIGENCE—*Last Clear Chance Doctrine—Lapse of Time.*—The doctrine of last clear chance is not based upon any contractual relationship, but has its foundation in humanity and natural justice. The immediate circumstances of the accident in this

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case transpired in a very short space of time, but this is true in most cases of accidental injury, and lapse of time, provided it is appreciable, is not usually material. The lapse of time in the instant case was, according to plaintiff's witnesses, appreciable, and the evidence is not such as to bring it within the influence of the *White Case*, 117 Va. 342, 84 S. E. 646, and the *Shiflett Case*, 118 Va. 70, 86 S. E. 860.

4. NEGLIGENCE—*Last Clear Chance Doctrine—Duty of Prevision.*—In the instant case, there probably was not any duty of prevision on the part of the defendant, but this fact is immaterial since it affirmatively appears here that the brakeman, as the car entered the switch, actually saw defendant in a position and under circumstances sufficient to charge him with knowledge that "the man on the track paid no heed to his danger and would take no step to secure his own safety."

5. EXPERT AND OPINION EVIDENCE—*Yard Brakeman.*—Testimony as to the distance within which a car could be stopped by one who had had thirteen years' experience as yard brakeman, and who was furnished full information as to the size and character of the car, the rate of speed at which it was running, the condition of the brakes and the grade of the track, is not without probative value. Such evidence is usual and appropriate for the purpose for which it was introduced.

6. NEGLIGENCE—*Last Clear Chance Doctrine.*—The last clear chance doctrine presupposes the negligence of the party injured.

7. NEGLIGENCE—*Last Clear Chance Doctrine—Knowledge of Danger.*—If one struck and killed by a railroad car saw the car in time to get out of the way, there could be no recovery by his administratrix, since the case would then lack the essential element of his unconsciousness of the danger, and his own negligence would bar the recovery. In that event the administratrix could not do more than make out a case of concurring negligence.

8. NEGLIGENCE—*Last Clear Chance—Knowledge of Danger—Evidence—Statement of Deceased—Questions for Jury.*—Deceased after being struck by a car said that he saw the car coming.

Held: That, this statement did not preclude deceased's administratrix from recovering damages for his death under the last clear chance doctrine. Plaintiff concedes that deceased saw the car after it was practically on him, but several of the witnesses stated that he never looked in the direction of the approaching car until it was too late for him to escape. In this state of the evidence, the jury would not have necessarily believed that he meant to say that he saw the car in time to get off the track.

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9. FELLOW SERVANTS—*Abolition of Rule as to Railroad Company—What is a Railroad Company.*—A company chartered by the General Assembly as a railway corporation by a special act, but operated exclusively in connection with another corporation, a cement company, for the private purposes of the latter, both corporations being under one common ownership and control, its engines being propelled by steam, and doing regularly the sort of work which imparts peculiar hazard to the business of railroads, is a railroad company within the provisions of section 162, Constitution of 1902, section 1294-k, Code of 1904, abolishing the fellow-servant doctrine.

Error to a judgment of the Circuit Court of Augusta county, in a proceeding by motion for a judgment for damages. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Curry & Curry and *Timberlake & Nelson*, for the plaintiff in error.

A. C. Gordon and *D. Lawrence Groner*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

William T. Wilson was struck and killed by a moving car on the yards of the Virginia Portland Railway Company, at Fordwick, in Augusta county, Virginia, and this suit was brought by his administratrix to recover damages from the railway company on account of his death. A demurrer to the evidence, interposed by the defendant, was sustained by the trial court, and the plaintiff brings the case here upon a writ of error.

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The evidence, taken as a whole, presents a sharp conflict upon the vital points, but viewing it, as we must, most favorably for the plaintiff, it tends materially to establish the following facts:

The defendant railway company was chartered by the General Assembly as a railway corporation by a special act in 1901 (Acts extra session 1901, chapter 296), but is now and has always been operated exclusively in connection with another corporation called the Virginia Portland Cement Company, and for the private purposes of the latter. Both corporations were under one common ownership and control. The employees of each were hired and paid by the same common authority, and the accounts for their wages distributed upon the books of the cement company according to the actual time of service rendered for each by the employees.

Wilson had been working for the cement company as sack-house foreman for some years. On the day of the accident which resulted in his death, he was directed to take his men from the sack house and do some work on the near-by tracks and yard of the railway. Shortly after going to this work, he left his place and going north crossed a track upon which an engine was backing towards him from the east. His purpose in doing this was to reach the fireman's side of the engine so that he might hand the latter some sort of a church subscription paper which had no relation whatever to the work of either corporation. As the engine passed he handed this paper to the fireman and then almost immediately stepped back and took his stand on another track which was north of and about eight feet from the track on which the engine was moving. Wilson had not looked to the east as he stepped on the track and did not do so at all until just about the moment he was struck by an empty flat-car, which, without his knowledge, had just previously been cut loose from the engine and shunted into

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the track on which he was standing, by an operation familiarly known as a flying switch. The wind was very high, and interfered to a considerable extent with his ability to hear the noise of the approaching car and the shouts of several co-employees who were trying to warn him. From the moment he stepped on the track until after it was too late for him to get out of the way, he was looking directly and intently at the fireman to whom he had delivered the paper. This fireman was warning him of his danger, but he did not seem to understand him, and all the witnesses who testified on the subject, several in number, stated that although he was plainly in imminent danger, he was obviously wholly unconscious of it until it was too late for him to save himself. It is a fair inference from the evidence that he was looking for some indication from the fireman as to his attitude toward the contents of the paper. At any rate he did not seem to know the car was coming and it was apparent to every observer that his attention was intently fixed in another direction. He was, however, thoroughly familiar with the yard and its operation, and he knew that it was a common practice there to make flying switches.

If the evidence ended here, we would have no difficulty whatever in sustaining the demurrer. Wilson was himself plainly guilty of negligence in going and remaining upon the track without looking to his own safety; but upon the whole case we are constrained to decide that his administratrix is entitled to recover upon the doctrine of the last clear chance.

There was a man at the brake on the rear end of the car, whose business it was to control its movement. He was in a position from which he could see Wilson from the time the car entered the switch leading to the track upon which the latter was standing. This man admits that he saw Wilson when the car reached the frog of the switch. The distance from the frog to the point of the accident was shown to be

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about eighty feet, and there was evidence tending to show that the car could have been stopped in less than one-fourth of that distance. Without going into the particulars of the evidence, which is in irreconcilable conflict, it is sufficient to say that the jury might have found, by accepting that which was favorable to the plaintiff and rejecting that which was unfavorable, that the brakeman saw Wilson in time to stop the car, that Wilson's attitude plainly indicated that he was unconscious of his danger and would be struck unless the car was stopped before it reached him, and that the brakeman's failure to do what a reasonably prudent man would have done under the circumstances was the proximate cause of the accident. This being true, the demurrer to the evidence ought to have been overruled.

We have reached this conclusion only after the most painstaking consideration of the record. The evidence, when viewed in its entirety, brings the case very near the border line between liability and non-liability. There is much in it from the standpoint of the defendant to make the judgment appear a hardship. It may be that if we were permitted to weigh the evidence, we would find for the defendant; and, for that matter, it may be that but for the demurrer the jury would have so found. However that may be, the jury might have found the facts to have been as above outlined, and upon such facts we are unable to differentiate the case in principle from the long line of decisions in this State sustaining recoveries under the rule of the last clear chance. This rule is not based upon any contractual relationship, but has its foundation in humanity and natural justice. The immediate circumstances of the accident in this case transpired in a very short space of time, but, as was said by this court in the *Crocker Case*, 117 Va. 327, 341, 84 S. E. 681, 686, "this is true in most cases of accidental injury, and lapse of time, provided it is appreciable, is not usually material." The lapse of time in

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the instant case was, according to plaintiff's witnesses, appreciable, and the evidence is not such as to bring it within the influence of the *White Case*, 117 Va. 342, 84 S. E. 646, and the *Shiflett Case*, 118 Va. 70, 86 S. E. 860.

The latest expression by this court upon the doctrine of the last clear chance is found in Judge Whittle's opinion in *Kabler's Adm'r* v. *Southern Ry. Co.*, 121 Va. 90, 92 S. E. 815, containing a comprehensive review of the leading Virginia cases on the subject. The rule of liability, as reiterated in the *Kabler Case*, clearly applies to this one. It is true that in the instant case there probably was not, as there was in the case cited, any duty of prevision on the part of the defendant, but this fact is immaterial since it affirmatively appears here that the brakeman, as the car entered the switch, actually saw Wilson in a position and under circumstances sufficient to charge him with knowledge that "the man on the track paid no heed to his danger and would take no step to secure his own safety."

We have not overlooked the fact that the brakeman says he did all he could to stop the car after he discovered the peril in which Wilson had placed himself; but, in view of the distance traversed by the car before it struck him as well as before it actually stopped, the rate of speed at which it was moving, the satisfactory condition of the brakes, and the distance within which the car could probably have been stopped, to say nothing of certain other discrediting features of his testimony, the jury would not have been bound to accept this statement. There was evidence upon which the jury might have found that this man saw Wilson's peril when eighty feet from him, and did not begin to set the brake until he was within ten feet of him.

We have carefully regarded also the contention that there was no sufficient evidence to show that the car could have been stopped between the frog of the switch and the point of the accident. The plaintiff's testimony upon this question,

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showing that the car could have been stopped within fifteen, or at most thirty, feet, was given by a colored man who for thirteen years had been the yard brakeman for the Chesapeake and Ohio Railway Company at Staunton. He was furnished full information as to the size and character of the car, the rate of speed at which it was running, the condition of the brakes and the grade of the track, and his testimony was based upon this information. No objection was offered to his evidence upon any ground, and the contention that it was without probative value cannot be sustained. Upon the contrary, such evidence is usual and appropriate for the purpose for which it was here introduced. *Wise Terminal Co.* v. *McCormick,* 107 Va. 376, 378, 58 S. E. 584. Furthermore, the fireman, who was the defendant's witness, testified that if the car was moving at four miles an hour (the speed indicated by some of the witnesses), it could have been stopped within forty or fifty feet, which was thirty or forty feet less than it ran after the brakeman must have seen Wilson's danger.

Reliance is placed by the defendant upon two statements which certain witnesses said Wilson made after the accident. One of these statements was that "he didn't know what had made him so careless." This, of course, is immaterial. The theory upon which the plaintiff seeks to recover presupposes the negligence of the decedent. The other statement is of more consequence. The fireman, to whom Wilson had given the paper, testified to the following conversation with him:

"Q. Then" (just after the accident) "where did you take him? A. To the doctor's office. Q. Did you have any conversation with him? A. Yes, sir. Q. Tell the conversation? A. The doctor walked out into a drug room, and I said, 'Mr. Wilson, I did all I could to save you, I motioned you to get out of the way,' and he said, 'Yes, you motioned your hand to get out of the way, and I don't know what I was think-

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ing about, and I saw that car coming.' I said, 'Yes, I did all I could,' and about that time the doctor came in and I didn't talk any more to him."

The material point in this statement is that Wilson said he saw the car coming. If he saw the car in time to get out of the way, there could be no recovery by his administratrix, since the case would then lack the essential element of his unconsciousness of the danger, and his own negligence would bar the recovery. In that event the administratrix could not do more than make out a case of concurring negligence. His statement, however, does not go far enough to produce this result. It does not fix the point or the time at which he saw the car. The plaintiff concedes that Wilson saw the car after it was practically on him, and several of the witnesses state that he never looked in the direction of the approaching car until it was too late for him to escape. In this state of the evidence, the jury could not have necessarily believed that he meant to say that he saw the car in time to get off. Indeed, they could not have attached the latter meaning to the statement without disregarding the clear weight of the testimony of those who saw the accident. If the statement was correctly understood and accurately repeated by the one witness who claimed to have heard it, we must give it as favorable interpretation on behalf of the plaintiff as the jury might have given it, in the light of all the other pertinent testimony in the case, and with due regard for the fact that it was made at a time when the declarant had just received a fatal shock and injury, and was undergoing the most intense physical suffering.

But it is urged that Wilson and the brakeman were fellow-servants, and that there can be no recovery by the plaintiff because the defendant was not such a "railroad company" as to bring it within the provisions of section 162 of the Constitution (Code 1904, page 259), and section

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1294-k of the Code, abolishing the fellow-servant doctrine. We cannot accede to this view. The defendant was operating under a railroad charter, its engines were propelled by steam, it was doing regularly, and in this very case, the sort of work which imparts peculiar hazard to the business of railroads. It possessed the powers and was subject to the duties of all other railroad companies chartered by and operating in this State. So far as the record discloses, it was doing no public business, but that was a question between it and the public. Its charter fixed its status as a corporation *Norfolk County Water Co.* v. *Wood,* 116 Va. 142, 81 S. E. 19; and the character of the work it was carrying on brings it directly within the purpose which the lawmakers had in view when they abolished the fellow-servant doctrine as to railroad employees. The case of *Norfolk Traction Co.* v. *Ellington,* 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117, invoked and relied upon by the defendant, is sufficient authority for the latter proposition.

For the reasons above stated, the judgment complained of must be reversed, and this court will overrule the demurrer to the evidence and enter a judgment in favor of the plaintiff for the amount of damages fixed by the verdict of the jury.

PRENTIS and BURKS, JJ., being of opinion that under the evidence the doctrine of last clear chance does not apply, dissent.

Reversed.

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Syllabus.

Richmond.

BANK OF BRISTOL v. ASHWORTH.

November 22, 1917.

1. APPEAL AND ERROR—*Reversal—Want of Jurisdiction.*—Where the record shows that the trial court had no jurisdiction over the defendant, then a judgment against him is plainly wrong and must be reversed.
2. JURISDICTION — *Nonresidents — Foreign Corporation — Service of Process.*—The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over him, if he is found and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance.
3. ABATEMENT AND REVIVAL—*Plea to the Jurisdiction—Record.*—Where defendant in due time filed its plea to the jurisdiction, and it was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, it became thereby as much a part of the record as the declaration itself.
4. ABATEMENT AND REVIVAL—*Plea to the Jurisdiction—Objection to Plea not Equivalent to Motion to Strike Out.*—Where defendant in due time filed its plea to the jurisdiction and the same became a part of the record, it could only be expunged from the record on a motion to strike out, and an order of the court, on an objection of plaintiff to the plea, not rejecting the plea, but merely holding that the plea was not good, cannot be held to have supplied the place of the necessary motion to strike out. If there had been a formal motion to reject, such a motion would have been inappropriate because the plea had already become a part of the record.
5. PLEADING—*Rejection of Plea—Striking from Record.*—If a plea or any other paper is filed by the clerk, either in vacation or in term, without authority of law, the mere filing of it does not make it a part of the record, and a motion may thereafter be made to reject, just as if it had never been filed; but when,

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as in the instant case, the plea is one which the law authorizes and requires to be filed at rules, it becomes essentially a part of the record, and requires as much certainty and positiveness of action to get it out as is required to bring something in which does not regularly belong in it. Before it was necessary for the plaintiff in error to bring the plea back into the record by a bill of exceptions, it was necessary for the defendant in error to take appropriate steps to strike it out.

6. PLEADING—*Construction—Relaxation of Technical Rules.*—To construe an objection to a plea to the jurisdiction as a motion to strike out, would be to relax one rule of practice, highly technical it is true, merely to give the other party the benefit of another rule none the less technical, and that too to defeat a substantial right.

7. ABATEMENT AND REVIVAL—*Plea to the Jurisdiction—Dilatory Pleas not Favored.*—A plea to the jurisdiction on the ground that the defendant was a foreign corporation, did no business, and had no office or place of business, in the State, and had no agent in the State upon whom process could be legally served, is not within the reason for which the law discourages mere dilatory pleas. The defense is not merely dilatory, and does not go merely to a question of venue within the State, but is of much more serious and far-reaching character.

8. APPEAL AND ERROR—*Bill of Exceptions—Pleas.*—An order of court holding that a plea to the jurisdiction was bad, is clearly a judgment upon the pleadings, and requires no exception to be stated in the order and no bill of exception to preserve the rights of the defendant thereunder, although a plea never authoritatively in the record, or being thus in is expressly stricken out, must be made the subject of a bill of exceptions, or an express order of the court, to make it a part of the record on appeal.

9. ABATEMENT AND REVIVAL—*Better Writ.*—It is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the State wherein the action is brought. But this requirement cannot avail where the plea shows a condition of facts under which no court in the State has jurisdiction.

10. ABATEMENT AND REVIVAL—*Plea to the Jurisdiction—Appearance in Person or by Attorney.*—It was objected to a plea to the jurisdiction that it was not good in form because the defendant corporation appeared in person instead of by attorney. The commencement of the plea was, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the com-

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mencement of all pleas. Code, section 3269, and the signature of the plea was, "Bank of Bristol, Inc., *By* A. B. Whiteaker, attorney."

Held: That, the objection was not well founded in point of fact.

Error to a judgment of the Circuit Court of Washington county, in an action of trover. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Jno. J. Stuart and *Pennington & Handy,* for the plaintiff in error.

Hutton & Hutton and *White, Penn & Penn,* for the defendant in error.

SIMS, J., delivered the opinion of the court.

J. S. Ashworth brought an action of trover against the Bank of Bristol, but did not describe the defendant as a corporation. The process was served on the president of the bank in this State, and there is no complaint here that the return of the officer on its face did not show due service. The defendant appeared at the rules and pleaded to the jurisdiction of the court on the ground that the defendant was a foreign corporation, did no business in this State, had no office or place of business here, and had no agent in this State upon whom process could be legally served. The clerk received and filed the plea and the plaintiff filed an objection, or objections, thereto, the character and scope of which do not appear in the record. At the succeeding term of the court the defendant further tendered a motion in writing to dismiss the case for want of jurisdiction of the court, and also tendered the affidavit of the president of the bank in support of its motion. The motion and

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affidavit set up substantially the same facts as the plea. On February 9, 1915, the court decided the questions at issue between the parties by an order in the following words:

"This day came the parties by their attorneys, and thereupon the defendant, by its attorney, appeared specially to object to the jurisdiction of this court, and filed its motion to dismiss this case, said motion supported by the affidavit of J. H. McCue, president of defendant, Bank of Bristol, to which motion and affidavit plaintiff objected, and the court having maturely considered defendant's plea in abatement, and the plaintiff's objection thereto, filed at rules, and said defendant's motion and affidavit, and plaintiff's objection thereto, made this day, doth sustain the plaintiff's objection to said plea, and doth reject the same, and doth overrule defendant's motion to dismiss this case."

It will be observed that no exception is noted in the order to this ruling of the court, nor does the record anywhere disclose any objection to it. At a subsequent day during the same term, the defendant pleaded not guilty, upon which plea issue was joined and a trial had, and there was a verdict and judgment in favor of the defendant in error.

No bills of exception appear in the record, and the only errors assigned are the rejection of defendant's plea in abatement and the overruling of its motion to dismiss the case.

The case lies within very narrow limits. The plea presented a good defense, if it was in due form and was properly made a part of the record so that it can be inspected. The motion likewise presented a good defense, if that defense could be presented in that way, and the ruling of the court thereon was objected to and such ruling and the affidavit filed with the motion were properly made parts of the record. In other words, if the *record* shows that the trial court had no jurisdiction over the defendant, then the judg-

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ment is plainly wrong and must be reversed. *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U. S. 190, 35 Sup. Ct. 579, 59 L. Ed. 910, and cases cited.

The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over them, if they are found and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance.

It must be conceded that the defendant in due time filed its plea to the jurisdiction, and that the same thereupon became a part of the record. It was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, and became thereby as much a part of the record as the declaration in the case. This being true, there was only one method, if strict rules of practice are to control our decision, by which it could be expunged from the record, and that was by a motion to strike out. No such motion was, in fact, ever made, nor indeed any motion at all in regard thereto. Some sort of objection, we know not what, evidenced solely by a bare reference thereto in the order of the court, was filed at rules, presumably after the plea was filed, and in sustaining that objection the order did purport to reject the plea; but the order must be construed in the light of the proceedings before the court, and when so construed it amounted manifestly to no more than holding that the plea was not good, and cannot be held to have supplied the place of the necessary motion to strike out. Even if there had been a formal motion to reject, as there certainly was not, such a motion would have been inappropriate because the plea had already become a part of the record. It is quite true that if a plea or any other paper

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is filed by the clerk, either in vacation or in term, without authority of law, the mere filing of it does not make it a part of the record, and a motion may thereafter be made to reject, just as if it had never been filed; but when, as in this case, the plea is one which the law authorizes and requires to be filed at rules, it becomes essentially a part of the record, and requires as much certainty and positiveness of action to get it out as is required to bring something in which does not regularly belong in it. Before it was necessary for the plaintiff in error to bring the plea back into the record by a bill of exceptions, it was necessary for the defendant in error to take appropriate steps to strike it out, and this was certainly not done, unless we construe his objection to the plea as a motion to strike out. To do the latter would be to relax one rule of practice, highly technical it is true, merely to give the other party the benefit of another rule none the less technical, and that, too, to defeat a substantial right. We can see no reason for doing this. The defense here presented, though offered in abatement, is not, we think, within the reason for which the law discourages mere dilatory pleas. The defense is not merely dilatory, and does not go merely to a question of venue within the State, but is of a much more serious and far-reaching character. This latter proposition is universally recognized in the authorities, and is emphasized in the case of *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U. S. 190, 35 Sup. Ct. 579, 59 L. Ed. 910, to which many others of like import might, if necessary, be added.

This court is confronted with the necessity of interpreting the effect of the lower court's action upon the plea in question, in the absence of any motion at all by the defendant in error, either to strike out or reject. The order must be construed in the light of the proceeding upon which it was based, and this proceeding was a mere undefined objection. There was no warrant for and no virtue in filing

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the objection to the plea at rules. The plea was authoritatively and legally in the record the moment it was filed, and the objection had no more force than if it had been offered for the first time in term. We think that the order of the court amounted to nothing more than holding that the plea was bad, and that it was, therefore, clearly a judgment upon the pleadings, which required no exception to be stated in the order and no bill of exception to preserve the rights of the plaintiff in error thereunder. 4 C. J. 110; 3 Ency. Pl. & Pr. 407; *Bennett* v. *Union Cent. Life Ins. Co.*, 203 Ill. 439, 67 N. E. 971, 973.

This conclusion does no violence to the established rule that a plea never authoritatively in the record, or being thus in is expressly stricken out, must be made the subject of a bill of exceptions, or an express order of the court, to make it a part of the record on appeal. We recognize the authority of *Fry* v. *Leslie*, 87 Va. 269, 12 S. E. 671, and *Leary* v. *Briggs*, 114 Va. 41, 76 S. E. 907, which may be said to go as far as any Virginia cases in the direction of the plaintiff's contention. In both of these cases the pleas had been filed at rules and were held not to be parts of the record, but they had first been expressly stricken out of it by the trial court. Some expressions in these cases might appear to sustain the view pressed upon us in this case, but in the light of the facts with which they were concerned we do not think they do so.

Having reached the conclusion that the plea in question is a part of the record, we may consider briefly the objections thereto. As already pointed out, no grounds of objection appear of record, but in argument two reasons have been urged against the form of the plea. The first of these is that it fails to give the plaintiff a better writ within this State. There is plainly no merit in this objection. "It is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court

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of the State wherein the action is brought. But this requirement cannot avail where the plea shows a condition of facts under which no court in the State has jurisdiction." *Deatrick* v. *State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489. The second objection is that the plea is not good in form because the defendant corporation appeared in person instead of by attorney. Of this we deem it sufficient to say that in our opinion the objection is not well founded in point of fact. The commencement of the plea is, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the commencement of all pleas. Code, section 3269. The signature of the plea is, "Bank of Bristol, Inc., *By* A. B. Whiteaker, attorney." This, we think, was a sufficient compliance with the rule invoked. The plea being good and a part of the record, we need not discuss the motion to dismiss.

The judgment will be reversed, and this court will enter an order overruling the objection to the plea and remanding the cause to the circuit court for further proceedings to be had therein not in conflict with the views herein expressed.

WHITTLE, P., and BURKS, J., dissenting.

Reversed.

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Syllabus.

Richmond.

CITY OF RICHMOND V. DREWRY-HUGHES COMPANY.

November 23, 1916.

Absent, Prentis, J.

Reheard January 17, 1918.

1. TAXATION—*City of Richmond's Powers—Limitation.*—While the city of Richmond under its charter has plenary powers of taxation, its power to tax any particular property is subject to any limitation that may be placed thereon by the legislature.
2. TAXATION—*Merchant's Tax—Powers of City to Tax—Acts 1915, page 119.*—The capital of merchants is intangible personal property, and under Acts 1915, page 119, it cannot be taxed by a city at a higher rate than thirty cents upon the one hundred dollars of assessed valuation thereof. The State imposes a license tax on merchants regulated by the amount of their purchases. The language of the act "that the capital of merchants shall not be subject to State taxation, but may be taxed locally as prescribed by law," means that such capital shall not be subject to State taxation on the *ad valorem* basis so long as the State continues to tax merchants with a license, and that as to local taxes they must be in accordance with the general law of the State, and had reference to the preceding provision of the same section placing a maximum of thirty cents thereon.
3. TAXATION—*Authority to be Plain.*—A tax must be plainly authorized before the citizen can be charged therewith.

ON REHEARING.

4. TAXATION—*Merchants' Tax—Powers of City to Tax—Acts 1915, page 119.*—The capital of merchants is "intangible personal property" within the meaning of the tax laws. By the express terms of the segregation act (Acts 1915, page 119), such capital is excepted from taxation by the State in the ordinary sense (that is, upon an *ad valorem* basis), and, therefore, is not within the class of intangible property segregated for

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State taxation, but is subject to be taxed locally "as prescribed by law." The phrase "as prescribed by law" does not mean the prescribed rate of thirty cents mentioned in the segregation act, but means that the local taxation of merchants' capital is to be controlled by other statutory provisions outside of the terms of that act; and statutory provisions outside of the segregation act, contemplating and authorizing a tax on merchants' capital at such rate as the county and city authorities deem necessary and proper, and thus responding to the expression "as prescribed by law," are found in section 69 of the charter of the city of Richmond (under which tax here in question was levied) and in sections 833-a and 1043 of the Code and section 46 of the tax bill.

5. TAXATION—*Merchants' Tax—Powers of City to Tax—Acts 1915, page 119.*—The language of the act in regard to merchants' capital is, "Except that the capital of merchants shall not be subject to State taxation but may be taxed locally as prescribed by law." The words "as prescribed by law" were not apt and natural words to convey the idea that local taxation on merchants' capital was to be limited to the rate fixed by the act. If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named in that particular act, undoubtedly he would have used the words "as prescribed by this act," or their equivalent, instead of "as prescribed by law." The purpose of the General Assembly seems to have been to leave merchants' capital to be taxed by localities practically as it had been prior to the passage of the segregation act, and this becomes the more apparent upon a consideration of the terms of that act in connection with the other kindred provisions of the tax laws enacted at the same time.

6. STATUTES—*Construction—In Pari Materia—Acts Passed at same Session of Legislature.*—The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy and they are to be construed together as if parts of the same act. They should be construed, if possible, so as to harmonize, and force and effect should be given to the provisions of each.

7. TAXATION—*Merchants—Policy of the State.*—It has been the policy of our law for years to impose a license tax on merchants as the exclusive method of State taxation, and to permit a property or *ad valorem* tax thereon by localities. It is not surprising, therefore, to find that the General Assembly, in

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launching a new but tentative and partial segregation plan of taxation, should have refrained from disturbing the status of the tax laws as to this particular property. A judicial construction in keeping with this natural and probable legislative purpose avoids conflict, and harmonizes all the provisions of the law enacted on the subject at the extra session of 1915, and its effect is to take from the general class of intangible personal property segregated to the State, the capital of merchants and to place it, as heretofore, in a class to itself.

8. TAXATION—*Merchant's Tax—Schedule C of the Tax Bill.*—The capital of merchants was not intended to be embraced in schedule C of the tax bill. While such capital might, upon a casual reading, appear to be included in that classification, yet when sections 8 and 9 of the schedule are read in connection with other provisions of the tax laws, particularly the segregation act itself and section 46 of the tax bill, it is clear that the capital of merchants was not intended to be embraced within this classification, but that the same is expressly excepted and excluded therefrom.

9. STATUTES—*Practical Construction—Period of Practical Construction.*—The rule of interpretation which permits the courts to look to the practical construction adopted by executive officers is usually applied to cases in which such construction has continued and been acquiesced in for a long period of time; but it is not to be confined to such cases. One reason for the rule is that the officers charged with the duty of carrying new laws into effect are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the new law, and to have formed an independent, conscientious and competent expert opinion thereon.

10. TAXATION—*Construction of Statute—Authority to be Plain.*—It is undoubtedly true as a general proposition, that taxes must be plainly authorized before they can be collected; but this rule does not go to the extent of cutting off and shutting out all the lights that may be reasonably brought to bear in determining the intention of the law-making power.

11. TAXATION—*Construction of Statutes—Repeal of Statutes.*—The question of the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in the instant case was expressly given by statute and had been exercised for many years. The real question is whether the former law has been repealed by

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implication by the segregation act, for it certainly has not been repealed thereby in express terms. Repeals by implication are not favored. But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive.

12. TAXATION — *Constitutional Law — Uniformity.*—As merchants' capital is not embraced in the classification of schedule C of the tax bill, but remains where it has practically always been, in a class to itself, subject to a license tax only by the State but liable to a local property tax, and the propriety and legality of such a classification has been too long recognized in this State to admit of serious question, and is, moreover, plainly authorized by section 169 of the Constitution of 1902, therefore, there is no force in the contention that if this construction is correct, the segregation act itself is unconstitutional because it violates section 168 of the Constitution of 1902, requiring uniformity in taxation.

13. TAXATION—*Uniformity—Intangible Property.*—There can be no question about the power to tax different classes of intangible property at different rates. A contrary holding would strike a fatal blow to the entire plan of taxation as established by the General Assembly in 1915 (see section 9 of the tax bill); and would, furthermore, be contrary to the settled law on the subject.

Error to a judgment of the Hustings Court of the city of Richmond. Judgment for petitioners. Defendant assigns error.

Reversed.

The opinion states the case.

H. R. Pollard, A. H. Light and *E. P. Buford,* for the plaintiff in error.

Geo. Bryan, Hill Montague and *E. Warren Wall,* for the defendant in error.

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Hunsdon Cary and *Henry C. Riely*, for others interested not parties to the proceeding.

HARRISON, P., delivered the opinion of the court.

This proceeding involves the right of the city of Richmond to assess the capital of merchants with an *ad valorem* tax in excess of thirty cents on the one hundred dollars.

By an ordinance approved April 9, 1915, the city assessed the capital employed by the defendant in error in its business as a merchant at the rate of $1.40 on the hundred dollars, and now appeals from the decision of the lower court holding that its power to levy such a tax was limited to thirty cents on the one hundred dollars. It is true that the city of Richmond, under its charter, has plenary powers of taxation, but its power to tax any particular property is subject to any limitation that may be placed thereon by the legislature.

By an act approved March 15, 1915, the General Assembly of Virginia installed a new system of taxation, under which the several kinds and classes of property were segregated, specifying and determining upon what subjects local taxes might be levied. Acts, extra session, 1915, page 119. By this act all taxable real estate and all taxable tangible personal property is set apart and made subject to local taxation only. It is then declared that "all insurance taxes and licenses on insurance companies and all taxable intangible personal property, rolling stock of all corporations operating railroads by steam, and all other classes of property not hereinbefore specifically enumerated in this act shall be and the same are hereby segregated and made subject to State taxation only; provided that nothing herein contained shall prevent any city from levying a tax upon said segregated intangible personal property assessed to the residents therein at a rate not to exceed thirty cents upon the one hundred dollars of assessed valuation thereof."

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The foregoing language is clear and comprehensive and standing alone, leaves it free from doubt that the legislature limited localities to thirty cents on the one hundred dollars as the maximum rate of taxation that they could impose upon taxable intangible personal property.

It is admitted, as it must be, that the capital of merchants belongs to the class known as intangible personal property. The city of Richmond in maintenance of its right to levy the tax here called in question, insists that the capital of merchants has not been segregated, but has been excepted from the operation of the act; resting that contention upon the following language of the same paragraph containing the prescribed limitation of thirty cents, namely: "except that the capital of merchants shall not be subject to State taxation, but may be taxed locally as prescribed by law." This contention cannot be sustained. The State taxes the capital of merchants on the basis of their purchases, calling it a license, and the purpose of the language relied on was clearly to exclude the idea that the State intended to tax the capital of merchants with both a license and an *ad valorem* tax. The act had already, by clear and specific language, segregated and set apart all taxable intangible personal property as one of the subjects that the State alone could tax, providing that localities might levy a tax thereon not exceeding thirty cents on the one hundred dollars, and it is not to be supposed that in the next breath the legislature intended to emasculate what it had just done by excepting from the operation of the act one of the largest classes of intangible personal property, thereby rendering its action meaningless.

Apart from the manifest desire and purpose of the legislature, as shown throughout this legislation, to adopt a more equitable system of taxation than had theretofore existed, it is clear that one of its chief purposes was to reduce the rate of taxation upon intangible personal property in order

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thereby to induce a more general return of such property, and to bring about uniformity in the rate of tax thereon by establishing a fixed rate applicable alike to all localities. The uniformity, consistency and reasonableness sought to be attained would be wholly defeated if the contention of the plaintiff in error were tenable. The whole legislation on this subject makes it, we think, clear that under the act of March 15, 1915, the city of Richmond was limited in its power to tax the capital of merchants to thirty cents on the one hundred dollars. The language of the so-called exception, "that the capital of merchants shall not be subject to State taxation, but may be taxed locally as prescribed by law," meant that such capital should not be subject to State taxation on the *ad valorem* basis, so long as the State continued to tax merchants with a license. The language, "but may be taxed locally as prescribed by law," meant that the local tax must be in accordance with the general law of the State, and had reference to the preceding provisions of the same section placing a maximum tax of thirty cents, by localities, upon intangible personal property.

If, however, this interpretation of the act of March 15, 1915, were doubtful, the result would be the same in this case, it being well settled that a tax must be plainly authorized before the citizen can be charged therewith.

The judgment complained of must be affirmed.

REHEARD JANUARY 17, 1918.

KELLY, J., delivered the opinion of the court.

This proceeding, which involves the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation, is before us on a rehearing. At the former hearing we were urged to render a speedy decision, and, notwithstanding an unusual pressure of work

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at that time, a conclusion was reached during the term at which the case was submitted, and an opinion was handed down on the 23rd day of November, 1916, affirming the judgment of the lower court and holding against the validity of the tax in question.

Within the time prescribed by law, the city of Richmond filed a petition for rehearing, to which were added supplemental petitions from the boards of supervisors of various counties and from the State Tax Board of Virginia, these latter petitioners asking permission to come into the case on the ground of the serious and far-reaching effect of the decision on local taxation throughout the State.

It is proper to say that while two members of this court, as at present constituted, did not participate in the former decision, this rehearing was granted by the judges who heard and decided the case upon the first argument, including the learned and honored author of the former opinion, since retired.

When the cause came on to be reheard, it was very elaborately argued by the same able and distinguished counsel who appeared originally therein, and by others no less able and distinguished who subsequently came into it; and upon a further consideration we are of opinion that our former decision was erroneous. The writer of this opinion participated and concurred in that decision, and assumes his full share of responsibility for the mistake which he now believes was made.

At the extra session of 1915, the General Assembly passed what is known as the State tax segregation act, which, so far as it need be set out in this immediate connection, provides as follows:

"* * * all taxable intangible personal property, rolling stock of corporations operating railroads by steam, and all other classes of property not hereinbefore specifically enumerated in this act, be, and the same are hereby, segre-

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gated and made subject to State taxation only; provided that nothing herein contained shall prevent any city from levying a tax upon said segregated intangible personal property assessed to the residents therein at a rate not to exceed thirty cents upon the one hundred dollars of assessed valuation thereof; * * * except that the capital of merchants shall not be subject to State taxation but may be taxed locally as prescribed by law; and the shares of stock of banks * * * which shares of stock shall be taxed as provided by law." (Acts 1915, page 119, section 1.)

It is conceded that the capital of merchants is "intangible personal property" within the meaning of the tax laws. By the express terms of the act quoted above, such capital is excepted from taxation by the State in the ordinary sense (that is, upon an *ad valorem* basis), and is, therefore, not within the class of intangible property segregated for State taxation, but is subject to be taxed locally "as prescribed by law." The ultimate and decisive question, therefore, is: What is meant by the phrase, "as prescribed by law"? Does it mean the prescribed rate of thirty cents mentioned in the segregation act, or does it mean that the local taxation of merchants' capital is to be controlled by other statutory provisions outside of the terms of that act? We feel constrained to recede from the opinion formerly expressed on this question and to adopt the latter view.

The words "as prescribed by law" were not apt and natural words to convey the idea that local taxation on merchants' capital was to be limited to the rate fixed in the act. This language, in its inception, was a part of a proposed new law, and in its ordinary, natural and usual sense would be understood to refer to something outside of the proposed law, either already a part of the existing statute law or thereafter to be enacted into a law by competent authority. If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate

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previously named in that particular act, undoubtedly he would have used the words "as prescribed by this act," or their equivalent, instead of "as prescribed by law."

If this be not true, then it would follow that "shares of stock of banks" could only be taxed locally at the thirty-cent rate, for, as we think, it cannot be plausibly contended that the words "as prescribed by law," when applied in the act to merchants' capital, have any other or different meaning than the words "as provided by law" when applied therein to bank stock. The necessary result of the decision of this court in *Tresnon* v. *Board of Supervisors*, 120 Va. 203, 90 S. E. 615, is that the local taxation of bank stock is not controlled by the terms of the segregation act.

Statutory provisions outside of the segregation act, contemplating and authorizing a tax on merchants' capital at such rate as the county and city authorities deem necessary and proper, and thus responding to the expression "as prescribed by law," are found in section 69 of the charter of the city of Richmond (under which the tax here in question was levied) and in sections 833-a and 1043 of the Code and section 46 of the tax bill.

The purpose of the General Assembly seems to have been to leave merchants' capital to be taxed by localities practically as it had been prior to the passage of the segregation act, and this becomes the more apparent upon a consideration of the terms of that act in connection with the other kindred provisions of the tax laws enacted at the same time. For example: The segregation act provides "that nothing herein contained shall prevent any city from levying a tax upon said segregated intangible personal property assessed to the residents therein at a rate not to exceed thirty cents upon the one hundred dollars of assessed valuation thereof; nor to prevent the board of supervisors of any county from levying a district road tax on all said segregated intangible personal property assessed to the residents in the magis-

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terial district proposed to be taxed for district purposes to be used exclusively for the construction and repair of roads located within the magisterial district in which said levy is laid at a rate not to exceed thirty cents on the one hundred dollars of assessed valuation." This provision, in practically the same language, was carried into section 9 of the act known as the tax bill (Acts 1915, page 162). It clearly appears, therefore, that counties, in taxing the intangible personal property segregated for State taxes, are limited not only as to rate but also as to the purpose for which the levy is laid, namely, district road purposes. Now, when we come to look to section 46 of the tax bill, which expressly provides for a State license tax upon the business of merchants, we find a provision which is wholly inconsistent with the one last quoted from the segregation act, if the latter act be construed to limit the local rate of taxation on merchants' capital to thirty cents on the one hundred dollars. This provision in section 46, so far as it need be quoted here, is as follows: "The sums imposed under and by virtue of this section shall be in lieu of all taxes for State purposes on the capital actually employed by merchants, or mercantile firms or corporations in said business, except the registration fee and franchise tax, and *except that such merchants shall not be exempt from the payment of county, district and road levies on the net amount of capital on hand on the first day of February of each year, and may be required to pay the usual city, county, district and road or other levies thereon, notwithstanding this act.*" (Italics added.) If, therefore, as contended on behalf of the defendant in error, the capital of merchants was embraced in the intangibles segregated for State taxation, then the counties, while limited under the segregation act to taxation thereof for district road purposes only, would be plainly given the further and contradictory right, under section 46

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of the tax bill, to levy taxes on such capital for *the usual county, district* and *other purposes,* as well as district road purposes. The clash is obvious and inevitable.

Scarcely less troublesome is the question which would arise between the segregation act, as construed by the defendant in error and section 833-a of the Code as amended and re-enacted by the act of March 17, 1915. This section authorizes the boards of supervisors *to fix the amount of the county levies for the current year, and to levy on all property assessed with tax within the county, and on the capital invested, used or employed in mercantile business.* Undoubtedly the legislature must have known, from the history of this section, that the specific provision therein with reference to capital in the mercantile business was expressly intended to place such capital upon precisely the same basis as all the other property upon which the counties had the right to impose a property tax for the usual county purposes; and the retention of this provision in the section as re-enacted in 1915 can hardly be satisfactorily explained upon any other theory than that the legislature intended to make no change in regard to this class of property.

The several acts to which we have adverted, namely, the segregation act, the amendment and re-enactment of sections 9 and 46 of the tax bill, and of sections 833-a of the Code, all single out and make specific reference to the capital of merchants, and they were all considered and passed at the same session and practically at the same time. That the terms of the last three, taken as a whole, are hopelessly in conflict with those of the first-named act, is perfectly manifest if we are to hold that the latter restricts such capital to the thirty-cent rate. It is idle to argue that this conflict can be reconciled by construing sections 9 and 46 of the tax bill and section 833-a of the Code to mean that the county authorities may do the things therein contemplated subject to the limitation as to purpose and rate fixed

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in the segregation act. The counties cannot require merchants to pay on their capital *the usual county, district and road or other levies,* if they are restricted to a *rate of thirty cents* and to the use *thereof for district road purposes.*

How, then, should we deal with the conflict with which we would thus be confronted? Plainly it is our duty, under settled and familiar rules of construction, to harmonize these several cognate acts of the legislature if this can be done without violence to their several express terms.

"The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy and they are to be construed together as if parts of the same act. They should be construed, if possible, so as to harmonize, and force and effect should be given to the provisions of each." 36 Cyc. 1151.

There is no difficulty in applying this rule of construction to the present controversy. It has been the policy of our law for years to impose a license tax on merchants as the exclusive method of State taxation, and to permit a property or *ad valorem* tax thereon by localities. The decision by this court, in 1899, of the case of *Supervisors* v. *Tallant,* 96 Va. 723, 32 S. E. 479, and the consequent amendment of section 883, clause 2, of the Code (March 2, 1900, Acts 1890-1900, page 731), are familiar landmarks in the tax laws of the State, the former pointing out the legislative action necessary to placing a local *ad valorem* tax on merchants' capital, and the latter manifesting the will and purpose of the legislature to authorize the tax. Never since the act of March 2, 1900, has there been any indication of a change of this will and purpose, but upon the contrary every subsequent act of the legislature which has dealt specifically with the subject has plainly shown an intention to preserve intact this feature of the tax laws. In view of

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this history, and of the well-known difficulties inherent in the subject, it is not surprising to find that the General Assembly, in launching a new but tentative and partial segregation plan of taxation, should have refrained from disturbing the status of the tax laws as to this particular class of property. A judicial construction in keeping with this natural and probable legislative purpose will avoid the conflict above pointed out, and will harmonize all the provisions of the law enacted on the subject at the extra session of 1915. The effect will be to take from the general class of intangible personal property segregated to the State, the capital of merchants and place it, as heretofore, in a class to itself.

It is earnestly insisted on behalf of the defendants in error that their capital is embraced in the classification of "intangible personal property" and in the classification and provisions of schedule C of the tax bill, and that this fact is conclusive in their favor. We are of opinion, however, that while such capital may, upon a casual reading, appear to be included in that classification, yet when sections 8 and 9 of the schedule are read in connection with other provisions of the tax laws, particularly the segregation act itself and section 46 of the tax bill, it is clear that the capital of merchants was not intended to be embraced within this classification, but that the same is expressly excepted and excluded therefrom. Section 9, as amended (Acts 1915 [extra session], chapter 117), provides that taxes on intangible personal property shall be as follows: "On all property embraced in classes 1, 2, 3, 4, 5 and 7 of this schedule, there shall be a tax of sixty-five cents on every one hundred dollars of the assessed value thereof, which shall be paid into the State treasury and applied to the payment of the expenses of the government. And any city in this State may levy a tax on such property assessed to residents therein at a rate not to exceed thirty cents on the one hun-

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dred dollars of assessed valuation thereof; and the board of supervisors may levy a district road tax on such property," etc. We think that the language, "*such property assessed to residents therein,*" used in the act to designate the property as to which cities and counties are restricted to the thirty-cent rate, *means property assessed for State taxation.* There is not, as we understand, any contention that merchants' capital, by virtue of the terms of schedule C, may be taxed by the State upon an *ad volorem* basis. This result is absolutely precluded by the terms of the segregation act and of section 46 of the tax bill. And yet, if we were to hold that the capital of merchants is in terms included in the classification of the schedule, and is, therefore, subject to the restricted local rate, it would inevitably follow that such capital is likewise subject to the rate therein specified of sixty-five cents for State purposes, because there is nothing in the language of sections 8 and 9 of the tax bill to warrant an argument that such capital was intended to be embraced in the classification for the purpose of local taxation and not for the purpose of State taxation.

The conclusion that merchants' capital was not intended to be embraced in schedule C is fortified by the further consideration that such capital, notwithstanding the use of practically the same language which is now claimed to include it, has never been treated as embraced therein since the tax bill was first framed by the act of April 16, 1903 (Acts 1902-3-4, pages 155, 158). If this class of property is included in the expression "all personal property embraced in this schedule," under the act as amended March 17, 1915 (Acts 1915, page 160), it has been so included ever since the passage of the original act, and, therefore, always, formerly and now, it has remained, under the terms of section 9, subject to a property tax by the State. It has not been so construed, but upon the contrary, ever since the passage of the tax bill, the State has continued its long pre-

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viously established practice and policy of taxing merchants by a license tax, based not on capital but on purchases, thus carrying into practical effect the very construction which we think necessarily results from a synthetic view of the terms of the several statutes enacted upon the subject by the General Assembly in 1915 and now under consideration.

We think the foregoing conclusions necessarily flow from an independent view of the statutes germane to the inquiry, but if it be conceded that the question is a doubtful one, then we should give due weight to the interpretation placed upon these statutes by that branch of the executive department of the State which is specially charged with the duty of construing and effectuating their provisions. It appears that the construction we have adopted is in accord with that which has been acted upon by the State Tax Board, composed of the Governor, the Auditor of Public Accounts and the Chairman of the State Corporation Commission. Under advice from that board, more than three-fourths of the counties of the State have applied a similar construction. It is true that the rule of interpretation which permits the courts to look to the practical construction adopted by executive officers is usually applied to cases in which such construction has continued and been acquiesced in for a long period of time; but it is not to be confined to such cases. One reason for the rule is that the officers charged with the duty of carrying new laws into effect are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the new law, and to have formed an independent, conscientious and competent expert opinion thereon. The segregation plan was adopted in pursuance of a special provision in our State Constitution, and the following quotation from Judge Cooley is in point:

"Great deference has been paid in all cases to the action of the executive department, where its officers have been

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called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind." Cooley's Constitutional Limitations (7th ed.), page 104.

It is contended, and it is undoubtedly true as a general proposition, that taxes must be plainly authorized before they can be collected; but this rule does not go to the extent of cutting off and shutting out all the lights that may be reasonably brought to bear in determining the intention of the law-making power. Cooley on Taxation, page 454.

Moreover, it is to be remembered that the question before us is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in this case was expressly given by statute and had been exercised for many years. The real question, at last, is whether the former law has been repealed by implication by the segregation act, for it certainly has not been repealed thereby in express terms. Repeals by implication are not favored. As is said in Cooley on Taxation, page 502: "But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. * * * In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive. It is not usual to modify or take away special powers by general laws; and if it is intended to do so in any particular case,

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it is reasonable to suppose the legislature would do so in unequivocal language." To the same effect see *Tresnon* v. *Board of Supervisors, supra.*

It remains to consider the further very earnest and very admirably presented contention of counsel for the defendant in error, that if the construction of the segregation act which we have adopted is correct, then the act itself is unconstitutional because it violates section 168 of the Virginia Constitution, which requires that all taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." This contention is necessarily disposed of by the treatment which we have applied to the terms of sections 8 and 9 of schedule C. We hold that merchants' capital is not embraced in the classification of that schedule, but remains where it has practically always been, in a class to itself, subject to a license tax only by the State but liable to a local property tax; and that the propriety and legality of such a classification has been too long recognized in this State to admit of serious question, and is, moreover, now plainly authorized by section 169 of the Constitution.

There can be no question about the power to tax different classes of intangible property at different rates. A contrary holding would strike a fatal blow to the entire plan of taxation as established by the General Assembly in 1915 (see section 9 of the tax bill); and would, furthermore, be contrary to the settled law on the subject. Judson on Taxation, section 441; 37 Cyc. 746; *Bradley* v. *City of Richmond,* 110 Va. 521, 524, 66 S. E. 872, and cases cited.

Upon the cross-error assigned, we find no reason to interfere with the decision of the lower court as to the amount of capital upon which the assessment was made; but we are further of opinion that the relief sought by the defendant in error should have been denied in all respects, and this court will so order.

Reversed.

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Richmond.

CITY OF RICHMOND V. O. H. BERRY & COMPANY.

January 17, 1918.

H. R. Pollard, E. P. Buford, A. H. Light and *Oscar L. Shewmake,* for the plaintiff in error.

McGuire, Riely, Bryan & Eggleston, Hunsdon Cary and *E. Warren Wall,* for the defendants in error.

KELLY, J., delivered the opinion of the court.

Reversed.

This case involves exactly the same question as the case of *City of Richmond* v. *Drewry-Hughes Company, ante,* p. 178 in which an opinion is handed down to-day. The judgment complained of is accordingly reversed.

Reversed.

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Syllabus.

Richmond.

ABRAHAMS V. BALL AND OTHERS.

January 24, 1918.

1. MORTGAGES AND DEEDS OF TRUST—*Substitution of Trustee—Jurisdiction of Court.*—Section 3419, Code of 1904, provides that when a trustee removes from the State, or declines to accept the trust, or resigns, the circuit court of the county or the corporation court of the corporation, in which the deed or other writing creating the trust "is, or might have been recorded, may, on motion of any person interested, appoint a trustee" in the place of the trustee named in the instrument. A motion under this section shall be after reasonable notice to all parties interested in the execution of the trust other than the plaintiff in such motion. The deed in the instant case was properly recorded in the county of Prince George, the city of Hopewell not then being in existence. But after the incorporation of the city of Hopewell, the land conveyed by the deed of trust being situated in the city as incorporated, the deed of trust was recorded in the clerk's office of the Corporation Court of the city of Hopewell. When the notes secured by the deed of trust became due, the creditors secured by the notes moved in the Corporation Court of Hopewell to substitute a new trustee for the original trustee on the ground that the original trustee had removed beyond the limits of the State.

   Held: That, as the deed in question might have been recorded in the Corporation Court of the city of Hopewell in contemplation of law, as it was in fact recorded, that being so recorded at the time the proceeding in the instant case was instituted, the corporation court had jurisdiction of the subject matter of the proceeding, in so far as such jurisdiction depended upon the place of recordation of the deed of trust.

2. RECORDING ACTS—*Recording in Two or More Places.*—There is no rule of law, statutory or otherwise, which prevents the valid subsequent recordation in other counties or cities of a deed once recorded in a given county or city. The circumstances that the *other* county or city is subsequently formed out of a portion of the county in which the deed was first recorded, and that it is not *necessary* to record the deed a second

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time in such *other* county or city, are immaterial. The original deed may be recorded in any county or city wherein the property embraced in the deed or any part thereof is located, and it will give the constructive notice provided for by said section 2465, Code of 1904. It is only when the original deed has been lost or mislaid that a certified copy thereof has to be used for the recordation thereof in another county or city. (Section 2506, Code of 1904.)

3. MORTGAGES AND DEEDS OF TRUST—*Substituting Trustee—Notice to Original Trustee.*—In proceedings under section 3419, Code of 1904, to substitute a trustee, the original trustee in a deed of trust is "interested in the execution of the trust," and is a necessary party to the proceeding and the statute requires notice to him of the proceeding.

4. MORTGAGES AND DEEDS OF TRUST—*Substituting Trustee—Subsequest Grantee.*—After a deed of trust had been given, the grantor therein conveyed a one-half interest in the land, subject to the deed of trust, to another.

Held: That, the grantee of the one-half interest was a necessary party to proceedings under section 3419, Code of 1904, to substitute a trustee in the deed of trust.

5. TRUSTS AND TRUSTEES—*Substitution of Trustee—Compliance with Statute.*—The proceeding under section 3419, Code of 1904, to substitute a new trustee for the original trustee named in the instrument creating the trust, is a statutory one and the express requirements of the statute must be at least substantially complied with in order that the court may have the jurisdiction of the subject matter conferred by the statute.

Error to an order of the Corporation Court of the City of Hopewell, in proceedings by creditors to substitute a trustee in a deed of trust. From the order substituting a trustee, the grantor assigns error.

Reversed.

STATEMENT OF THE CASE AND FACTS.

This case involves the validity of a proceeding by motion in the Corporation Court of the city of Hopewell under section 3419 of the Code of Virginia, substituting a trustee in a certain deed of trust which was recorded in such city in the clerk's office of such court at the time that the

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proceeding was instituted and the order complained of was entered, on the grounds that the original trustee had removed beyond the limits of this State and had declined to accept the trust and act thereunder.

THE FACTS.

The following are the material facts in the case:

When the deed of trust set out in the appellees' notice was executed, the land conveyed thereby was wholly within the county of Prince George, and the deed of trust was duly admitted to record in the clerk's office of the Circuit Court of Prince George county on the 10th day of March, 1916. On the 1st day of July, 1916, the city of Hopewell was incorporated by act of the General Assembly of Virginia (Acts 1916, p. 89), and the land conveyed by said deed of trust was incorporated by said act as a part of the city of Hopewell. On the 16th day of September, 1916, the said deed of trust was recorded in the clerk's office of the Corporation Court of the city of Hopewell. When the notes secured by the said deed of trust became due, the said J. G. Brown, trustee, who had been a practicing attorney in Hopewell, was not in the city. Through the attorneys for the holders of said notes, efforts were made to ascertain his whereabouts (which need not be set forth here), with the result that he could not be found, so that he was not called upon to act and did not act as trustee, nor do anything even in part performance of any duty as trustee under the deed of trust.

The trust deed was in the ordinary and usual form of a deed of trust securing the payment of certain notes, with power in the trustee to sell the property conveyed, etc., etc., upon request of the note holders, should default be made in the payment of such notes at maturity.

After the said deed of trust was given, the grantor therein, Fannie Abrahams, the appellant, conveyed a one-

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half interest in the land conveyed by said deed of trust to one Mollie Salsbury, subject to said deed of trust, and such deed was admitted to record in the clerk's office of the Circuit Court of Prince George county.

The motion to substitute the trustee, as aforesaid, was made by appellees, the note holders, the payment of whose debts were secured by said deed of trust.

Legal notice of the motion was given by said creditors to the grantor in said deed of trust, the said appellant, who appeared and defended the motion.

So far as appears from the record in this case, no notice of the motion was given to Mollie Salsbury (the said grantee from appellant, subsequent to said deed of trust, by deed duly recorded before said proceeding was instituted, as aforesaid), nor was any legal notice given to the original trustee in said deed of trust.

The order complained of, so far as material, is as follows:

"This day came the plaintiffs, by counsel, and moved the court to appoint Chas. T. Morris, of the city of Hopewell, Va., as trustee in the place and stead of J. G. Brown, who has removed beyond the limits of this State, and has declined to act under the hereinafter mentioned deed of trust, who was trustee in a certain deed of trust from Fannie Abrahams, dated the 9th day of March, 1916, and recorded in the clerk's office of this court, in Deed Book 1, page 402. And this day came also the said Fannie Abrahams, by counsel. On consideration whereof, it appearing to the court that the parties hereto are the only persons interested in the execution of the trust of the aforesaid deed, and that the said J. G. Brown, the sole trustee in said deed, has removed beyond the limits of this State and has declined to act under said deed of trust, and that reasonable notice of this motion has been given to each of the parties hereto, except the plaintiffs, the court doth adjudge, order and decree that the said Chas. T. Morris be, and he is hereby appointed and

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substituted as trustee in the said deed of trust hereinbefore mentioned, in the place and stead of the said J. G. Brown, to act thereunder, and in accordance with the terms thereof, and with all the powers, rights and privileges, and liable to all the duties and obligations of trustee as conferred or imposed by said deed of trust."

Wm. McK. Woodhouse, for the plaintiff in error.

Morris & Williams, Smith & Gordon and *James F. Minor,* for the defendants in error.

SIMS, J., having made the foregoing statement, delivered the following opinion of the court:

The following questions raised by the assignments of error in the case will be passed upon in their order as stated below:

1. Did the Corporation Court of Hopewell have jurisdiction of the subject matter—namely, the proceeding under section 3419 of the Code of Virginia by motion to substitute a trustee in the deed of trust involved in this case, in so far as such jurisdiction is dependent upon the place of recordation of the deed of trust?

The decision of this question depends upon the proper construction of the statute referred to therein.

Section 3419 of the Code of Virginia (Pollard's Code, 1904), so far as material, is as follows:

"When a trustee in a will, deed or other writing * * * removes beyond the limits of this State, or declines to accept the trust, or when, having accepted, he resigns the same, as he may be allowed to do, the circuit court of the county or * * * corporation * * * court of the corporation, in which such will was admitted to probate, or such deed or other writing is, or might have been recorded, may, on motion of any person interested, appoint a trustee or trustees in the place of the trustee named in

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such instrument. A motion under this section shall be after reasonable notice to all parties interested in the execution of the trust other than the plaintiff in such motion. * *"

It will be observed from the language of the statute that if the deed in evidence *was* or *might have been recorded* in the clerk's office of the Corporation Court of the city of Hopewell at the time the proceeding in question was instituted, then, in so far as the place of recordation of the deed affects the question, the Corporation Court of the city of Hopewell had jurisdiction of the subject matter in the instant case.

At the time of the first recordation of the deed, it was properly recorded in the county of Prince George, the city of Hopewell not then being in existence. And it was not *necessary* for the deed to have been recorded in the clerk's office of the Corporation Court of the city of Hopewell, when or after that city was incorporated, in order to give notice thereof to subsequent purchasers and creditors under the registry statute section 2465, Code of Virginia, although the real estate conveyed by the deed was located in the territory included in the boundaries of said city, which was formed out of a portion of Prince George county. There is no controversy before us as to this well settled proposition. But it is contended for appellant that, the deed having been once recorded in Prince George county it was properly and fully recorded under section 2500 of Code of Virginia, and also under said section 2465; that such recordation gave the Circuit Court of Prince George county jurisdiction of the subject matter in question, and that although the deed was recorded in the clerk's office of the city of Hopewell after the formation of that city and before the proceeding in question was instituted, such subsequent recordation of the deed could not take away the jurisdiction aforesaid of the Circuit Court of Prince George county; and, hence, in contemplation of law, the deed was not and could not have been recorded, as it purports to have been, the second time.

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It seems to us that the position taken for appellant on the question under consideration is untenable. In taking this position the question of the jurisdiction of the corporation court is approached from the wrong point of time, and also assumes that because it was not *necessary* for the deed to have been recorded in the city of Hopewell, as aforesaid, that it could not have been so recorded as to give notice thereof to subsequent creditors and purchasers under section 2465 aforesaid. No court had any jurisdiction of the subject matter of the instant case until the cause of action thereof arose, which was not until after the city of Hopewell was formed. At that time the deed was in fact recorded in such city as aforesaid. The real estate conveyed by the deed was located in such city, as above stated. Therefore, under section 2465 aforesaid, the latter recordation in itself gave notice of the deed to subsequent purchasers and creditors irrespective of its prior recordation elsewhere. It was the place where its recordation would be least likely to be overlooked in any examination of the title to the real estate conveyed by the deed. Thus possible subsequent litigation growing out of any question of notice of such deed being had by subsequent purchasers and creditors was best likely to be avoided. This motive might have induced the second recordation of the deed, and very properly so, we think.

The position of counsel for appellant on this subject is, in effect, that the registry statutes of Virginia authorize one recordation of a deed and no more, and hence that a second recordation thereof is a nullity and is of no force or effect. The contrary was held in *Stinson* v. *Doolittle*, (C. C.), 50 Fed. 12, 15, construing the effect of the registry statutes of Minnesota, which are similar to those of Virginia.

We know of no rule of law, statutory or otherwise, which prevents the valid subsequent recordation in other counties or cities of a deed once recorded in a given county or city.

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The circumstances that the *other* county or city is subsequently formed out of a portion of the county in which the deed was first recorded, and that it is not *necessary* to record the deed a second time in such *other* county or city, are immaterial. The original deed may be recorded in any county or city wherein the property embraced in the deed or any part thereof is located, and it will give the constructive notice provided for by said section 2465. It is only when the original deed has been lost or mislaid that a certified copy thereof has to be used for the recordation thereof in another county or city. Section 2506, Code of Virginia. We are, therefore, of opinion that the deed in question "might have been recorded" in the Corporation Court of the city of Hopewell in contemplation of law, as it was in fact recorded; and that being so recorded at the time the proceeding in the instant case was instituted, the corporation court aforesaid had jurisdiction of the subject matter of the proceeding, in so far as such jurisdiction depends upon the place of recordation of the deed of trust.

2. Was the original trustee in the deed of trust involved in the instant case "interested in the execution of the trust," and so a necessary party to the proceeding to substitute a trustee under the statute, section 3419 aforesaid?

We are not cited to any authority on this question by counsel for appellant, except an editorial in 11 Va. Law Reg. 1035. This editorial cites no authorities, but expresses a decided inclination to the opinion that a trustee in an ordinary deed of trust is not interested in the execution of the trust and need not be made a party to or be given notice of the proceeding to substitute a trustee under the statute.

We have found no authority holding that, under a statute such as ours, the trustee named in a deed of trust of the ordinary form, securing the payment of debts, must be notified in a proceeding to substitute a trustee.

The authorities on this subject referred to by 39 Cyc. 288 and also by 1 Perry on Trusts and Trustees, sec. 282

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and note, have been examined and no case has been found which holds that the trustee must be notified in a proceeding to substitute a trustee, except where there is a statute expressly requiring such notice, or where the trustee has undertaken and partly performed the trust.

The rule in chancery of the High Court of Justice of England is that trustees under a will who have not accepted or acted in performance of the trust have no interest in the execution of the trust and need not be notified in a proceeding before the court by parties in interest to have the court appoint substituted trustees. *In re Martin Pye's Tusts,* 42 L. T. Rep. 247; *In re Bignald's Settlement Trusts,* L. Rep. 7 Ch. 223.

In Virginia the form of the statute as contained in the Code of 1873 (chapter 174, section 8), on the subject of the notice to be given in a proceeding by motion to substitute a trustee, was as follows: "Provided that the grantor and grantee in said deed, their heirs or personal representatives, the creditor, surety, or other persons intended to be secured thereby, or their personal representatives, shall have ten days' notice of such motion," etc. Under the statute as it stood in that form, the case of *Hunter* v. *Vaughan,* 24 Gratt. (65 Va.) 400, was decided. The question involved in that case on the subject of notice was, whether a subsequent purchaser of real estate conveyed by a deed of trust or his personal representative should have notice of a proceeding by motion under the statute to substitute a trustee. And it was held that it was not necessary that notice should be given to the subsequent purchaser or his personal representative, "as he was neither a grantor nor grantee nor a surety or other person intended to be secured by the deed." It is true that in that case there were two original trustees named in the deed of trust, one of whom had died and the other had removed from the State, and notice was given to the latter and to the personal representative of the for-

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mer. But that was in effect required by the provision of the statute as it then stood providing that notice should be given to the *grantee* in the deed. However, no question as to such notice was involved in or passed upon by the decision in that case.

By the Code of 1887 the provision of the statute under consideration on the subject of notice was changed (section 3419, Code, 1887), into the form it has since retained (section 3419, Pollard's Code, 1904), which (as we have seen from the above quotation from the statute) is as follows: "A motion under this section shall be after reasonable notice to all parties interested in the execution of the trust other than the plaintiff in such motion." Under the statute in the latter form, which governs the instant case, the question is, was the original trustee named in the deed of trust in evidence "interested in the execution of the trust?"

It appears from the statement of facts, above set forth, that the original trustee in the instant case, at no time undertook the trust, or was obligated to do so, or performed any act thereunder. The deed of trust is in the ordinary and usual form, securing the payment of certain debts. Under such deed it was not until there was default made in the payment of the debts secured thereby that the trustee could have acted thereunder; nor then until requested to do so as aforesaid. No power to act as trustee was vested in the latter until there was the default aforesaid and he was requested to act. When the default occurred and he was looked for so that request might be made of him to act, he could nowhere be found. Even if he had been then found and the request had been made of him to act, he was in no way obligated to act. He was at liberty to decline to act. Every executory contract to be binding must be mutual in its obligation. Therefore, the trustee had neither earned, nor had he any binding executory contract entitling him to earn, commissions as trustee. It has not been suggested that the trustee could have had any other interest than that

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of commissions as trustee in case of sale by him under the trust deed. This being the situation, I am of opinion that the original trustee had no interest in the execution of the trust vested in him at the time of the commencement of the proceeding in the instant case to substitute a trustee in his place and stead. Moreover, by virtue of said section 3419 and also of section 3423 of Code of Virginia (which confer upon the substituted trustee all the powers of the original trustee), it was not necessary for the original trustee to be before the court to enable the legal title to the property embraced in the trust deed to pass.

I am of opinion, therefore, that in the instant case the original trustee was not "interested in the execution of the trust," and hence he was not a necessary party to, and the statute did not require notice to be given him of, the proceeding aforesaid; but a majority of the court are of a different opinion on this point, namely, that the original trustee was interested in the execution of the trust and hence that he was a necessary party to the proceeding, and that the statute did require notice to be given him of the proceeding.

3. Was Mollie Salsbury a necessary party to the proceeding, so that lack of notice to her rendered the order complained of void?

This question must be answered in the affirmative.

The proceeding is a statutory one and the express requirements of the statute must be at least substantially complied with in order that the court may have the jurisdiction of the subject matter conferred by the statute. 7 Rob. Pr., pp. 16-18; *Pitzer* v. *Logan*, 85 Va. 374, 376-7, 7 S. E. 385.

The language of the statute above quoted on the subject under consideration is as follows: "A motion under this section shall be after reasonable notice to all parties interested in the execution of the trust, other than the plaintiff in such motion * * *" This is an express requirement that such notice to *all* the parties so interested shall pre-

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cede the motion, and hence the giving of such notice is jurisdictional.

Prior to the change of the statute aforesaid into its present form by the Code of 1887, under the decision in *Hunter* v. *Vaughan, supra,* Mollie Salsbury would not have been a necessary party to the proceeding, and notice thereof to her would not have been required. But under the statute as it has stood since the Code of 1887, as above noted, Mollie Salsbury being interested in the execution of the trust (in like manner as the grantor in the trust deed was interested, to the extent of a half interest in the property embraced in the trust deed), the statute expressly required notice to be given to her of the proceeding as a condition precedent to the jurisdiction of the court. Hence, for lack of such notice the court had no jurisdiction to enter the order complained of, and it is void. Being void for such reason, the order is a nullity, and it is necessarily void, not only as to Mollie Salsbury, but as to all parties. For this reason, the case must be reversed.

Since in a new proceeding to substitute a trustee, if such be had, the evidence may not be the same as in the proceeding before us for review, it is unnecessary for us to pass upon the remaining assignment of error involving the question of whether there was sufficient evidence before the trial judge to support his findings of fact, that the original trustee had removed beyond the limits of the State and had declined to accept the trust and act thereunder.

Therefore, for the reasons stated above, because of lack of notice to Mollie Salsbury and to the original trustee, required by the statute, the order complained of must be set aside and annulled; without prejudice, however, to the institution and prosecution by the appellees of a new proceeding under the statute for the substitution of a trustee in the deed of trust aforesaid, should they be so advised, not in conflict with the views expressed in this opinion.

Reversed.

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Richmond.

AUSTIN v. SANDERS.

January 24, 1918.

1. VENDOR AND PURCHASER—*Deficiency in Quantity of Land—Jurisdiction of Equity—Adequate Remedy at Law.*—Courts of equity have jurisdiction to render decrees for the value of the deficiency in the quantity of land sold by the acre. The basis of this jurisdiction is either mutual mistake, or the mistake of one party occasioned by the fraud or culpable negligence of the other. The jurisdiction being elementary, it is immaterial that the complainant has a complete and adequate remedy at law.
2. VENDOR AND PURCHASER—*Deficiency in Quantity of Land—Sale by Acre or in Gross.*—Complainant brought his suit in equity to recover for a deficiency in quantity of a tract of land sold by defendant to complainant. The tract of land in question had been placed in the hands of one L. for sale, who negotiated the sale to complainant and was complainant's partner in the purchase. The evidence did not show that there was any misrepresentation on the part of the defendant as to the quantity of land in the boundary conveyed. It appeared that all the misrepresentations with reference to the quantity of land were made by L., either before he became the agent of defendant, or at the time or after he became a partner of complainant, so that the latter misrepresentations were of one partner to another, for which complainant could not be held responsible. The deed was silent as to the quantity of land that was in the boundary, and the record did not show that defendant was responsible for the statements made by L. as to the quantity of land in the boundary.

   Held: That the evidence did not show that the sale was expressly or impliedly a sale by the acre.

Appeal from a decree of the Circuit Court of Prince William county. Decree for defendant. Complainant appeals.

Affirmed.

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The opinion states the case.

E. Hilton Jackson and *C. A. Sinclair,* for the appellant.

Jno. M. Johnson and *Thomas H. Lion,* for the appellee.

BURKS, J., delivered the opinion of the court.

This is a suit in equity to recover for deficiency in quantity of a tract of land sold by the appellee to the appellant. There was a demurrer to the bill on the ground that the complainant had a full, adequate and complete remedy at law and that a court of equity was without jurisdiction in the premises. The demurrer was properly overruled. Courts of equity have jurisdiction to render decrees for the value of the deficiency in the quantity of land sold by the acre. The basis of this jurisdiction is either mutual mistake, or the mistake of one party occasioned by the fraud or culpable negligence of the other. The jurisdiction being elementary, it is immaterial that the complainant has a complete and adequate remedy at law. *Hull* v. *Watts,* 95 Va. 10; *Blessing* v. *Beatty,* 1 Rob. (40 Va.) 316.

Upon the hearing on the merits, the bill of the complainant was dismissed, and from that decree this appeal was taken. The law relating to sales by the acre is well settled in this State, and is not controverted by the appellee, and hence need not be restated; but the appellee denies that the evidence in the cause makes out a case for the application of the law. The case, therefore, is narrowed down to an examination of the evidence to ascertain the facts. Numerous deeds and other documents were offered in evidence, but the appellant was the only one of the parties to the transaction who was examined as a witness in the case. Neither appellee nor J. W. Latham, who negotiated the sale

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and was a partner in the purchase, was examined as a witness. The appellant files with his deposition a number of letters from Latham, but none of his own, so that his side of the correspondence can only be gathered from the replies made by Latham. Bearing this fact in mind, we shall endeavor to state the case as fairly as we can from the record.

Miss Mary Custis Lee was the owner of a tract of 1677 acres of land in Fairfax county, which was divided into three tracts containing upwards of five hundred acres each. A map of this and other parts of what was known as the "Ravensworth" lands was made by R. R. Farr, surveyor, and most of the conveyances of any part of "Ravensworth" refer to this map. Accotink Run ran through the lands of Miss Lee, and two of the subdivisions thereof, one containing 512 1/2 acres and the other 581 acres, lay east of the Run, and the remaining one, containing 583 acres, which is the land in controversy, lay west of said Run. The last mentioned tract came by mesne conveyances to Samuel L. Monroe and F. F. Marbury, who placed it in the hands of J. W. Latham, a real estate agent of Washington, D. C., for sale. Just how Latham first got the idea that the tract contained eight hundred acres is not clear, though at a later stage he tells how this idea was confirmed. After some negotiations he effected a sale to the appellee, Frederick H. Sanders. The deed to Sanders is dated July 31, 1913, and he gave back a deed of trust to secure $4,000 of purchase money. This deed was not acknowledged till August 15, 1913, and both deeds were recorded on September 4, 1913. Just when these deeds were delivered does not appear, but both were probably delivered the same day, on or after August 15, 1913. The deed from Monroe and Marbury to Sanders describes the land as "a part of Ravensworth estate, and assessed for taxation as 583 1/2 acres." Sanders evidently bought the land for speculative

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purposes, and immediately (before his deed was recorded) put it into the hands of the same J. W. Latham for sale, who set to work to find a purchased. At this stage of the transaction he tells us why he thought the tract contained 800 acres. In July, 1914, he wrote to the appellant: "As to the 800 acres, I got that from Monroe himself, after the sale was made to Sanders. Monroe brought the original survey or tracing to me and showed me where there were 581 acres surveyed and stated, if there were 581 acres in that piece there were even more than 800 in the piece we bought; that I believe I showed you." This map or tracing seems not to have been drawn to scale, and hence the error in his deduction, although the deed to Sanders said that it was "assessed for taxation as 583½ acres." While Latham says that he got this information from Monroe after he sold to Sanders, which could not have been earlier than July 31, 1913, this is manifestly an error, for in a letter to the appellant dated June 30, 1913, at least a month before the conveyance to Sanders, he speaks of this land as "the 800-acre tract." Doubtless he conceived this idea of acreage by the comparison aforesaid, but he is manifestly in error as to the date of the conception. There is no evidence in the record that he had any other information that the tract contained 800 acres.

This tract of land was in the hands of J. W. Latham for sale as agent for Monroe and Marbury prior to the sale to Sanders, which latter was probably not consummated earlier than August 15, 1913. Prior to the latter date Latham had conceived the idea that this tract contained 800 acres, and he always spoke of it as "the 800-acre tract." It seems to have been first brought to the attention of appellant by Mr. Meschendorf, a friend of Latham, in June, 1913, a month and a half or two months before Sanders acquired title. It is also manifest that the land was being bought and sold for speculative purposes. The first cor-

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respondence we have on the subject is a letter from Latham to appellant, dated June 30, 1913, in which he speaks of the land as "the 800-acre tract," and also of the reasons why he thinks the purchase was a good one. On that date he wrote the appellant:

"Mr. Meschendorf of Forest Depot, Virginia, with whom I co-operate in the sale of farms, writes me that you want some more information regarding the 800-acre tract I have for sale fourteen miles from the city.

"This is one of the great bargains we have, besides the land and timber, there is a fine water power on the place, which the Alexandria Lighting Company is contemplating buying, to supply the power for the electric plant in the town, the fuel for which now costs them $30,000 per year and there is no other power in existence that can be obtained. If you will come down and buy this place, I can make you some money. There is a splendid growth of young timber on this tract, which will be worth the price of the farm in a few years."

The next that we hear anything about this farm is in a letter from Latham to appellant, under date of August 18, 1913, in which he again speaks of this tract as "the 800-acre tract," and says further:

"You spoke as if you would buy it, if I would take half interest in it. I will do so, and put up one-half of the expense, and divide the profits equally, between us when sold; and should I bear all expense of showing the property to customers, advertising and so on, I will charge one-half commission or 2 1/2%.

"If you think well of this, come up and inspect as soon as possible and lets fasten it, or if you cannot get off right away, write me just when you can, and I will try to get him to hold it off."

The appellant, in his deposition admits that he and Latham were partners in the purchase, and in effect says that

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he would not have purchased if Latham had not gone in with him. This partnership between Latham and the appellant must have been formed about that date. Presumably the letter of August 18, 1913, was taken as an acceptance of the proposition of appellant that Latham should go into partnership with him. The appellant states that he first came into personal relationship with Latham at his office in Washington in the latter part of August, 1913; so that this must have been after the partnership was formed. The appellant states that it was at this interview in his office in the latter part of August, 1913, that he was assured by Latham that there were 800 acres and probably more in the tract. As to the source of Latham's information as to the quantity of acres in the tract, the appellant was asked this question: "Did Latham ever state any reason why he made the statement that this tract of land contained 800 acres or more to you?" to which he replied: "He said the map showed a larger portion of it to No. 5 than it did to others. He showed me this was so." So it appears that Latham did not make any representation as the agent of Sanders that it was claimed or asserted by him that the land contained 800 acres, but that it was a deduction of his own from his examination of the map which he exhibited to the appellant, and it seems to have convinced him of the fact also as he states: "He showed me this was so." It is true that the appellant states that the representations made to him by Latham were made by him as the representative of Sanders, and "as no representative of mine," but it is a little difficult to understand how the appellant could discriminate between what representations were made by Latham as agent for Sanders and what as a member of the firm.

After the partnership was entered into, Latham, acting on behalf of himself and the appellant, entered into an agreement with Sanders to purchase the land, and prepared a memorandum of agreement, dated August 25, 1913, which

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was subsequently signed by Sanders, in which it is stated that the land is "supposed to contain 800 acres." Latham seemed to be obsessed with the idea that there were 800 acres in the tract, and whenever he speaks or writes of it, it is always as "the 800-acre tract." The very first mention he made of it in his letter of June 10, 1913, he speaks of it as "the 800-acre tract."

The price of the tract was $12,000. Latham was to pay $4,000, the appellant $4,000, and they were jointly to pay the lien of $4,000 placed upon the land by Sanders. The land was conveyed directly to Austin by deed bearing date January 9, 1914. Latham's name was omitted from the deed because he stated that he could handle the land better if it stood in the name of the appellant only, but an agreement was entered into between the appellant and Latham on January 10, 1914, in which the land is again spoken of as "the 800-acre tract," by which Latham's interest in the land is fully and completely recognized, and by deed bearing date January 20, 1914, Austin conveyed to Latham an undivided one-half interest in the land. The reason for this will be stated later.

It will be observed that the contract of purchase bears date August 25, 1913, whereas the deed of conveyance was not made until January 9, 1914, so that the parties had ample time to examine the title and before the deed was made the appellant says that he asked for an abstract of title, and that Latham said that Howard Smith had passed upon the title and it was perfectly good. Latham, it will be observed, was a joint purchaser with appellant of this land, and if the title was examined by Smith, as stated by Latham, it disclosed the fact that the deed from Monroe and Marbury to Sanders described the land as "assessed for taxation as 583 1/2 acres," so that the parties were apprised before the transaction was concluded as to the real quantity of land in the boundary. They had both looked at the map, how-

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ever, and drawn their own conclusions that there must be at least 800 acres in the tract, but for that the appellee was in no wise responsible.

After this transaction was closed by the deed from Sanders to Austin, it appears that Latham became very much interested in a coal mine in Kentucky, and was putting all the money he could get into that venture. He got the appellant to convey to him a one-half interest in the land, as agreed upon, and soon thereafter placed a deed of trust upon his half interest to secure a loan for $6,000. He wrote to appellant, assuring him of the value of the land by the fact that he had been able to place a loan of $6,000 on half of it, subject to the encumbrance of $4,000, after the parties who made the loan had inspected the premises.

Latham made default in the payment of his part of the $4,000 encumbrance placed upon the land by Sanders, and the land was sold by the trustee in the Sanders deed to enforce the lien thereof, and at that sale the appellant became the purchaser at the price of $3,865, and thereby acquired title to the whole tract, discharged not only of the Sanders deed of trust but of the deed which Latham had placed on his half of the land. Austin then brought this suit for the recovery of the deficiency in the quantity of land. The deed from Sanders to Austin, it will be remembered, does not state the quantity of land in the tract. Austin, in his petition for appeal in this case states that he does not claim under the agreement of August 25, 1913, in which it is said that the tract is supposed to contain 800 acres, but under the deed in which no quantity is stated. His position on this subject is probably better stated in his own language.

"Some inquiry was made at the hearing as to whether the complainant was suing upon the deed of January 9, 1914, or upon the agreement of August 25, 1913. A very casual analysis of the bill demonstrates that the suit is based upon a failure of consideration, to-wit, the non-ex-

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istence of two hundred and twenty (220) acres conveyed by the deed when interpreted by the well known rule, 'light of surrounding circumstances' rule. There are two sufficient reasons why an action of this sort could not be brought under the agreement of August 25, 1913, the first being that both Latham and Austin would have to be parties to such a suit and the second being that, the contract in question being executory, would only furnish the basis for a suit for specific performance or a suit for damages brought in the name of both Latham and Austin for failure to perform, if they so elect. On the other hand, the deficiency which is the subject of the suit at bar, grows out of an executed contract, the full purchase price having been paid and, in view of the statute of frauds, the only party who could sue for such deficiency is the party named in the contract, to-wit, Austin. Further argument would be superfluous to demonstrate to the court what was conceded to be law at the hearing, namely, that the deed must be interpreted as to the area of the property by what the parties had in mind before and at the time the deed was delivered, to-wit, eight hundred (800) acres. The evidence overwhelmingly shows that this amount was in the minds of both parties at the time the deed was executed and delivered, and induced Austin to agree to pay the purchase price of twelve thousand ($12,000.00) dollars for the eight hundred (800) acres."

We are of opinion that the evidence does not show that there was any misrepresentation on the part of the appellee as to the quantity of land in the boundary conveyed; that all the misrepresentations that were made by Latham with reference to the quantity of land were made either before he became the agent of Sanders, or at the time or after he became a partner of appellant; that the latter were misrepresentations of one partner to another, for which the appellee is not responsible; that the deed was silent as to the quantity of land that was in the boundary; and that the

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record does not show that Sanders was responsible for the statements made by Latham as to the quantity of land in the boundary; and that the sale was not expressly or impliedly a sale by the acre.

For these reasons, we are of opinion that the decree of the circuit court should be affirmed.

Affirmed.

SIMS, J., dissenting:

I regret to say that I cannot concur in the majority opinion or in its results. It places the conclusion to affirm the decree complained of upon two grounds:

1. Because the evidence does not show that there was any misrepresentation on the part of the appellee as to the quantity of land.

2. Because the evidence does not show that the sale was expressly or impliedly a sale by the acre.

1. As to the second ground referred to (which will be first considered):

Since the opinion of this court delivered by Judge Baldwin in the leading case on this subject in Virginia of *Blessing* v. *Beatty*, 1 Rob. (40 Va.) 287, it has been the settled rule in this State, followed by an unbroken line of decisions, that, where the contract of sale refers to the number of acres of the land, although a price in gross for the whole of the land is stated and nothing is said in the contract as to the sale being by the acre, it is presumed to be a sale by the acre, unless there is other and affirmative proof that the contract was one of hazard as to acreage and that the sale was expressly agreed to be in gross; and that the burden is always upon the party asserting the contract of hazard (which is not a contract which is favored in equity), to prove an express contract of a sale in gross; and the latter must be clearly established by the facts before the court will so hold. *Blessing* v. *Beatty, supra; Crawford* v. *Mc-*

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Daniel, 1 Rob. (4 Va.) 448; *Jackson* v. *Ligon,* 3 Leigh (30 Va.) 161; *Benson* v. *Humphreys,* 75 Va. 198; *Berry* v. *Fishburne.* 104 Va. 459; *Watson* v. *Hoy,* 28 Gratt. (69 Va.) 696, 698; *Emerson* v. *Stratton,* 107 Va. 303, 307; *Pack* v. *Whitaker,* 110 Va. 122—to cite only a few of the cases on this subject.

In the cause before us the contract of sale, which was in the form of a statement in writing signed by the appellee and accepted by a memorandum at its foot signed by Latham, acting for himself and appellant, was as follows:

"Memorandum of Agreement.

"Washington, D. C., August 25, 1913.

"I have this day sold to J. W. Latham, of Washington, D. C., and R. F. Austin, of Greenwood, Miss., all my tract of land, in Fairfax county, Virginia, lying on the south side of Accotink Run, one mile west of Pohick station, on the R. F. & P. R. R., formerly owned by Miss Mary Custis Lee, supposed to contain 800 acres, on the terms, to-wit; $500.00 cash, paid in hand, a receipt for which is hereby acknowledged, seven thousand five hundred ($7,500.00) January 10, 1914, and said Latham and Austin assume the present mortgage that is now on the place, of four thousand dollars ($4,000.00) payable as follows: ($1,000.00) one thousand dollars, on August 2, 1914, one thousand dollars ($1,000.00) dollars on August 2, 1915, and balance of ($2,000.00) dollars August 2, 1916. A full settlement of all interest and taxes, etc., and a general warranty deed given on January 10, 1914.

"Witness my hand and seal this 29th of August, 1913."

(Signed) "Frederick H. Sanders (Seal)."

There was no evidence in the cause that there was any express agreement that the sale was to be in gross and not by the acre.

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Under the rule in Virginia above referred to, therefore, the evidence in the cause shows that there was "impliedly" a sale by the acre, and hence I cannot agree with the conclusion of Judge Burks on the second ground upon which he rests his opinion.

2. As to the first ground above referred to, on which the opinion of Judge Burks is based:

The same line of decisions in this State above referred to, and some of which are above cited, establish the doctrine that the principle on which equity grants the relief sought by the appellant in this cause is that of granting relief from the payment of money induced by a *bona fide* mistake of fact as to the quantity of the land purchased. As said by Judge Baldwin in *Blessing* v. *Beatty, supra*: "The principle upon which equity gives relief in cases of deficiency * * * in the estimated quantity upon the sale of lands, I understand to be that of mistake; whether the mutual mistake of the parties or the mistake of one of them occasioned by the fraud or culpable negligence of the other. I do not perceive any other principle upon which the jurisdiction can be founded * * *" The mistake of the vendee and plaintiff in such a case may or may not have been induced by the misrepresentation, fraud or culpable negligence of the vendor. If it was induced by a mutual mistake, both of vendor and vendee (as indeed is stated by the majority opinion in the outset of it as well as in Judge Baldwin's opinion above quoted), the vendee plaintiff is entitled to the relief of recovery back of so much money as he may have been induced to pay to or for the vendor, by such mistake of fact existing on the part of the vendee. The gravamen of such a case and the only essential thing to entitle the vendee plaintiff to relief is that he paid the money under a *bona fide* mistake of fact as to the quantity of the land, when the sale was a sale by the acre and not one of hazard (not a sale in gross), as aforesaid.

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Whether the mistake of appellant was induced by any misrepresentation of the appellee, therefore, is immaterial. If the truth was that Latham first conceived the mistaken idea that there was 800 acres in the tract of land and that his mistake was induced by the Accotink Run not being laid down accurately on the map of the "Ravensworth" lands made by R. R. Farr, surveyor, and even if Latham communicated this obsession of his to the appellee (as he did undoubtedly to the appellant), all of this, as I view the matter, was immaterial. The fact remains, that however induced, at the time the appellee signed the contract aforesaid, and it was entered into by appellant; and at the time the appellant paid the first $4,000 paid by him; at the time the deed to appellant from appellee was delivered; and at the time appellant subsequently paid the second $4,000 and interest and expenses presently to be mentioned; both appellee and appellant were acting under the honest mistake that said land contained 800 acres, when in fact it contained a substantially less quantity, to-wit, only 580.22 acres and Latham also acted under the same honest mistake of fact. There is no suggestion by the evidence in the cause of any conscious misrepresentation or fraud on the part of any one.

That the appellee acted under said honest mistake of fact, is conclusively proved to be a fact by the contract of sale above quoted, signed by him, in its reference to the land as "supposed to contain 800 acres." (Indeed, if any representation as to quantity from appellee was necessary, here was a representation directly by him to appellee, and in writing, in the very contract of sale itself. That the contract was drawn by some one else, is of course immaterial. The reference in the contract of sale to the "supposed" quantity of the land, is however material, as evidence of the quantity of land which is presumed, under the rule above referred to, to have been in the minds of the contracting

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parties and to have fixed the total purchase money upon a computation based on a sale by the acre.) That Latham may have before the date of such contract made the same representation to appellant, is in my view of the case wholly immaterial, or in what capacity Latham was then acting, whether as agent for the appellee or as a partner of appellant. The ultimate fact, as shown by all of the testimony in the cause, and about which there is no suggestion of any doubt anywhere, or on the part of any party in interest, is that the appellant acted under the honest and *bona fide*, although mistaken, belief that there were 800 acres of the land when he paid that portion of the purchase money which was paid by him therefor; and that the appellee acted under the same mistake of fact when he received that portion of the purchase money which appellant paid him directly and when he took appellant's obligation as to the assumption of the $4,000 mortgage or deed of trust on the land to be paid for appellee, which eventually resulted in the sale of the land thereunder and the further payment of purchase money for said land made by appellant for appellee.

Accordingly, under said contract, appellant, on or before January 9, 1914, paid to the appellee $4,000 or one-third of the purchase money. Latham paid the like portion of the purchase money on or before January 9, 1914, or it was "settled" between Latham and appellee. This left a remainder of one-third of the purchase money unpaid, being the $4,000 covered by the mortgage or deed of trust debt mentioned in said contract, the payment of which was assumed by Latham and appellant. Subsequently appellant, on August 2, 1914, paid $500 on the principal of said $4,000 remainder of purchase money and $60 on account of interest on the $4,000 for one year. Latham defaulted in the payment of his part of such remainder due August 2, 1914, and in November, 1914, the land was sold under the mortgage or deed of trust aforesaid and was bought in by ap-

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pellant for the amount of the balance of said $4,000 remainder of purchase money (and interest to that date) then still unpaid, and expenses of sale, aggregating $3,865. That is to say, by his purchase at said sale and the payments made by him prior thereto aforesaid, appellant paid two-thirds of the purchase money of $12,000 for said land, and about $129.80 in excess thereof, expenses of said sale, all under the mistaken belief that he was getting at least 800 acres of land.

The evidence in this cause established beyond all question, therefore, that the appellant thus paid two-thirds of said purchase money under an honest mistake as to the quantity of said land. By actual survey in June, 1915, the quantity of the land was ascertained to be 580.22 acres, or a shortage of 219.78 acres was found to exist of the supposed quantity of 800 acres, as stated in the contract of sale aforesaid. If there were no facts with respect to buildings on the land or other circumstances to disturb the average price per acre (and there is no suggestion thereof in the record), the contract price of the land (supposed to be 800 acres at $12,000) was $15 per acre. The shortage of 219.78 acres at $15 per acre would amount to $3,296.78. As appellant paid two-thirds of the contract price for the land to and for the appellee under the mistake aforesaid (not computing the expenses of sale aforesaid paid by him, with which appellee should not be chargeable), the appellant paid for two-thirds of said 219.78 acres shortage of land, and is entitled to recover of the appellee two-thirds of said $3,296.78, or the sum of $2,197.80, with legal interest on $68.68 parcel thereof from August 29, 1913; on $1,030.22 parcel thereof from January 9, 1914; and on $1,098.90, the residue thereof, from November . . . ., 1915 (the day of sale under said deed of trust) until paid, and the costs of suit in the court below and upon this appeal.

Latham paid for one-third of said shortage of land, but he is not a party before the court seeking to recover for such

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payment. It is true that appellant claims to be entitled to such recovery also, but no principle is perceived upon which such a recovery by appellant could be allowed. The principle on which relief is granted in such cases, above stated, does not apply to such a recovery by appellant, who did not pay such money.

It should perhaps be further stated that it is true, as mentioned in the majority opinion, that the deed from appellee to appellant omits any statement of the acreage of the land. But there is no suggestion in the record that this omission was caused by any change in the supposition or belief of the vendor and vendee that the land contained 800 acres at least. Such omission, therefore, can have no effect to prove an express contract of hazard or of a sale in gross. At most the deed was merely silent as to what the contract was as to acreage, and gave no covenant of warranty as to the quantity of acreage on which an action of covenant would lie. But since this case is not an action of covenant, the silence of the deed on this point is immaterial. The deed does not supersede the contract of sale as to the supposed quantity of the land by stating that a different quantity from that named in the contract is conveyed; but uses language which would operate to convey the land whatever in fact might be the acreage, whether in excess of the contract quantity or less than that quantity.

For the foregoing reasons I am of opinion that the decree complained of should be reversed.

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Syllabus.

Richmond.

BUILDERS SUPPLY COMPANY OF HOPEWELL, INC.

v.

PIEDMONT LUMBER COMPANY, INC.

BUILDERS SUPPLY COMPANY OF HOPEWELL, INC.

v.

PEERLESS LUMBER COMPANY, INC.

January 24, 1918.

1. MUNICIPAL CORPORATIONS—*Jurisdiction of Corporation Court—Place of Business of Corporation.*—In the certificate of incorporation of the defendant company, the place wherein its principal office was to be located was designated as "Hopewell, Prince George county, Virginia." Afterwards the community known as Hopewell was severed from the county and incorporated as the city of Hopewell.

   Held: That, the severing of the territory from the county of Prince George, just as it changed the citizenship of every natural person then domiciled within the area thus severed, so it also changed the location of the principal offices of all corporations which were located within that area. And if defendant corporation's principal office was located in the territory incorporated as the city of Hopewell, the Corporation Court of that city had jurisdiction of an action against it.

2. ABATEMENT AND REVIVAL—*Presumptions and Burden of Proof.*—Upon a plea to the jurisdiction, or in abatement, just as is the case with other affirmative pleas, the burden of proof is, as a general rule, on the defendant.

3. SERVICE OF PROCESS—*Corporations.*—Section 14 of chapter 1 of the act concerning corporations (Acts 1902-04, chapter 442 [Code 1904, section 1105-a, subdivision 14] as amended by Acts 1910, chapter 35) requires every corporation of a certain class, where all of its officers and directors are non-residents of the city or county where its principal office is located, to appoint an attorney in fact residing in such city or county, upon whom all legal process against the corpora-

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tion may be served, and provides that if the company fails to appoint such attorney in fact, then all legal process against the corporation may be served upon the clerk of the court of such county or city wherein is located such principal office, having jurisdiction of such action or proceeding.

Held: That, under this statute returns of service of process against such corporations upon the clerk should affirmatively show that the principal office of the company sued is within the county or city in which the action is instituted, for the rule is that where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized and prescribed must be strictly followed, or the service will be invalid and the judgment rendered thereon by default void. However, returns defective in this respect may be amended to show the jurisdictional fact even after judgment and removal on error to the Supreme Court of Appeals.

Error to a judgment of the Corporation Court of the city of Hopewell, in an action of assumpsit. Judgment for plaintiffs. Defendant assigns error.

Remanded.

The opinion states the case.

Flaherty & Zeleznik, for the plaintiff in error.

Lightfoot & Tucker, for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

These two cases present precisely similar questions, and by stipulation of counsel have been argued together. The Piedmont Lumber Company, Inc., and the Peerless Lumber Company, Inc. (hereinafter called the plaintiffs), instituted separate actions against the Builders Supply Company of Hopewell, Inc. (hereinafter called the defendant), in the Corporation Court of Hopewell, Va., which resulted in separate judgments against the defendant.

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The question involved is whether or not the Corporation Court of the city of Hopewell had jurisdiction of the actions. It appears that at the time the causes of action arose and at the time of the incorporation of the defendant, the area now embraced in the city of Hopewell had not been incorporated, but was a part of the county of Prince George. In the certificate of incorporation of the defendant, the name of the county, city or town wherein its principal office was to be located is designated as "Hopewell, Prince George county, Virginia." This designation, certainly at that time, fixed the location of the principal office of the defendant company in the county of Prince George, because there was then no incorporated city of Hopewell, the unincorporated community of Hopewell being then a part of such county. Since then, by the act approved February 26, 1916 (Acts, 1916, p. 89) that community theretofore known as Hopewell has been severed from the county and incorporated as the city of Hopewell. For the defendant it is claimed that as the charter locates the principal office in the county, it remains there even though now actually located within the geographical area which has since been incorporated as the city of Hopewell; whereas the plaintiffs claim that by the act of incorporation the principal office theretofore in the county was transferred to the city. This is the question which was chiefly argued, which was raised in the lower court by the defendant, by motion to dismiss for want of jurisdiction, plea in abatement, and by motion in arrest of judgment for errors appearing on the face of the record.

No authorities precisely in point have been cited by counsel, and the question appears to be one of first impression in this State. As to its proper determination, however, we have no doubt. The severing of the territory from the county of Prince George, just as it changed the citizenship of every natural person then domiciled within the area thus severed, so it also changed the location of the principal

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offices of all corporations which were located within that area. Any other construction would lead to hopeless confusion. While the Virginia statute only requires that the certificate of incorporation shall designate the name of the county (and post-office address therein), city or town wherein the principal office of the corporation "In this State is to be located," it is nevertheless true that the location of the principal office of every corporation must be at some particular place within such city, county or town. If the charter itself does not designate such particular location therein, the company must, if it undertakes to execute its corporate powers, establish such particular location. If thereafter the territory in which such principal office is located is severed from the particular county, city or town, designated in the certificate of incorporation, then such severance carries with it such principal office, just as it carries with it the natural persons and property of that territory. Just as the political rights of the citizens must thereafter be exercised within the jurisdiction of the new county, city or town, and their taxes there paid to the local officers of such new municipality, so the taxes of the corporations the principal offices of which are located within such area must also be paid to such local officials. If the county of Prince George had been divided into two counties and each given a different name, the principal offices of all the corporations theretofore located in the county of Prince George would, by operation of law, be transferred to one or the other of the new counties. The city of Manchester has recently been consolidated with the city of Richmond, and all corporations whose offices were theretofore located within the city of Manchester, from the date such consolidation became effective, were thereby changed and located within the city of Richmond.

The question, then, is one of fact—that is, whether the office of the defendant company was located at the time of

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the incorporation of the city of Hopewell, and at the time of the institution of the actions, within that territory which is now embraced within the corporate limits of the city of Hopewell. In view of the fact that the cases were argued upon the assumption that this is true, we shall assume it to be a fact, and for the further reason that upon a plea to the jurisdiction, or in abatement, just as is the case with other affirmative pleas, the burden of proof is, as a general rule, on the defendant. 1 C. J. p. 275, and cases cited in note. The jurisdiction of the Corporation Court of the city of Hopewell to entertain these actions is perfectly clear, without any reference to where the causes of action arose, if it be true as a physical fact that the principal office of the defendant company was within the corporate limits of Hopewell at the time the actions were instituted.

There is another point in the cases requiring attention. The defendant moved to quash the returns of the officer upon the writs. These returns were in these words: "Executed on the 12th day of August, 1916, by delivering within the city of Hopewell, Virginia, a true copy of the within summons to W. I. Gilkeson, clerk of the Corporation Court of the city of Hopewell, in person, none of the officers or directors of Builders Supply Company of Hopewell, Inc., being residents of the city of Hopewell or the county of Prince George and no person having been designated, upon whom service of process may be made in accordance with the provisions of section 14, chapter 1 of the act concerning corporations."

It will be noted that the process was served upon the clerk of the Corporation Court of the city of Hopewell, and this by authority of section 14 of chapter 1 of the act concerning corporations (Acts 1902-04, c. 442 [Code 1904, § 1105a, subd. 14] as amended by Acts 1910, c. 35). This section requires every corporation of this class, where all of its officers and directors are non-residents of the city or county

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where its principal office is located, to appoint an attorney in fact residing in such city or county, upon whom all legal process against the corporation may be served, and provides that if the company fails to appoint such attorney in fact, then all legal process against the corporation may be served upon the clerk of the court of such county or city wherein is located such principal office, having jurisdiction of such action or proceeding.

These returns are defective, in that they fail to show that the principal office of the defendant was in the city of Hopewell. The reference in the returns to the county of Prince George may be treated as surplusage, because the sergeant of the city of Hopewell had no jurisdiction in the county; but the returns should affirmatively show that the principal office of the company sued is within the county or city in which the action is instituted, for the rule is that where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized and prescribed must be strictly followed, or the service will be invalid and the judgment rendered thereon by default void. *Staunton Perpetual Bldg. & L. Co.* v. *Haden, Trustee, et al.*, 92 Va. 201, 23 S. E. 285; 1 Va. L. Reg. 655, with note thereto by Judge E. C. Burks.

The court, in this case, should have required the sergeant of the city of Hopewell to amend his returns so as to show whether or not the principal office of the defendant company was within the area of the corporate limits of the city of Hopewell. It is established, however, in this State, that it is not too late now to make such amendments, and if the returns shall be amended so as to show the jurisdictional fact required, the cases should be affirmed. *Goolsby* v. *St. John*, 25 Gratt. (66 Va.) 146; *Stotz* v. *Collins*, 83 Va. 423; 2 S. E. 737; *Shenandoah Valley R. Co.* v. *Ashby's Trustee*, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898; *Finney* v. *Clark*, 86 Va. 354, 10 S. E. 569; *Commercial, etc., Co.* v.

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Everhart, 88 Va. 952, 14 S. E. 836. If, however, when such returns shall be amended it shall appear that the principal office of the defendant was not within the corporate limits of the city of Hopewell at the time the process was executed, then the cases should be reversed and the actions dismissed.

The cases will, therefore, be remanded with leave to have the returns amended in accordance with the facts, within sixty days from this date.

Remanded.

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Syllabus.

Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* CATLETT.

January 24, 1918.

Absent, Burks and Kelly, JJ.

1. PRESUMPTIONS AND BURDEN OF PROOF—*Sufficiency of Evidence to Establish Fact.*—A fact cannot be established, whether by direct (testimonial) or circumstantial evidence unless there is some evidence which has some logical probative value to establish the fact.
2. PRESUMPTIONS AND BURDEN OF PROOF—*Sufficiency of Evidence to Establish Fact—Preponderance of Evidence Rule.*—In civil cases the reasoning to establish a fact is not required to measure up to the exclusion of every other hypothesis consistent with the evidence; and it is required only that the fact considered as established be the more probable hypothesis from the evidence with reference to other hypotheses predicated upon the evidence—that is to say, in civil cases, a fact may be established by a preponderance only of the evidence. But the preponderance of the evidence rule does not dispense with the requirement that there must be some evidence which has some logical probative value to establish a fact, before that fact can be even considered as a possible hypothesis predicated upon the evidence—*a fortiori*, before it can be considered as the more probable hypothesis from the evidence.
3. EVIDENCE—*Preponderance of Evidence—Injury which may have Resulted from One of Two Causes.*—When damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by the preponderance of the evidence.
4. WATERS AND WATERCOURSES—*Malaria—Mosquitoes—Two Causes.*—In an action for damages against a railroad company caused by the illness of plaintiff and family from malaria, which

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plaintiff alleged was occasioned by mosquitoes bred in stagnant water in an old canal bed, which by an act of Assembly it was the duty of defendant railroad to drain, the evidence for the plaintiff did not go beyond proving by a preponderance of it, that the water in the canal bed was the most favorable place for the production of mosquitoes. It also appeared from the plaintiff's evidence that the water in other places near by was favorable for the production of a sufficient number of mosquitoes to have caused the malaria complained of. There was no evidence to show that the one breeding place was more probable than the other of the mosquitoes which caused the malaria complained of, except the fact that more mosquitoes were probably bred in the water in the canal bed than in the water in the other places.

Held: That, a verdict for plaintiff upon this evidence must be set aside and annulled and a new trial granted.

5. PRESUMPTIONS AND BURDEN OF PROOF—*Circumstantial Evidence—Inference from a Presumption.*—The inference that the mosquitoes which caused the malaria complained of were bred in the bed of the old canal was not proved as a fact in the case, and in the very nature of the subject under the circumstances of the instant case could not by any possibility have been so proved. In such case, the rule that "an inference cannot be drawn from a presumption, but must be founded upon some fact legally established," applies. See *Chesapeake and Ohio Railway Company* v. *Ware, post,* 246, 95 S. E. 183.

6. WATERS AND WATERCOURSES—*Drainage—Mandamus.*—By an act of Assembly it was the duty of defendant railroad to drain an old canal bed, so as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected.

Held: That, the discharge of the duty in question could be fully enforced, if need be, by the appropriate remedy of mandamus.

Error to a judgment of the Circuit Court of Fluvanna county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

STATEMENT OF THE CASE.

The defendant in error (hereinafter referred to as plaintiff), recovered a verdict in the court below against the plaintiff in error (hereinafter referred to as defendant) for

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damages during the period covered by the suit, to-wit: from June 1, 1915, to March 25, 1916, caused by the illness of the plaintiff and family from malaria which the plaintiff alleges was occasioned by stagnant water in the old canal bed which an act of Assembly of Virginia made it the duty of the defendant to so drain as not to leave stagnant water by which the health of the citizens along the line of said canal might be injuriously affected.

The trial court refused to sustain the motion of the defendant to set aside the verdict and grant a new trial, and the sole question involved in the appeal is whether, under the rules applicable in the appellate court in such case (the evidence and not the facts being certified), there was sufficient evidence to sustain the finding of the jury that the malaria in question was caused by the stagnant water aforesaid. On this question, regarding the evidence as upon a demurrer thereto by the defendant, the following are the material facts:

THE FACTS.

By act of Assembly (Acts 1878-9, p. 118), the legislature of Virginia authorized the Richmond and Alleghany Railroad Company to purchase the old James River and Kanawha canal and to construct a railroad along its line and abandon the canal, but with the following provision and condition:

"The said * * * railroad company shall, as fast as they abandon the said canal, so drain the same as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected."

The defendant is the successor in title of the Richmond and Alleghany Railroad Company and admits its duty to keep the bed of the old canal drained as required by said statute.

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The plaintiff and family occupied a store house and dwelling combined between twenty-five and thirty feet from the old canal bed (according to one witness for plaintiff), from early in May, 1914, until this suit was instituted, March 25, 1916. This house was also located between two branches, both of which were about the same distance from the house, to-wit (as one witness stated it most extremely for the plaintiff) about "twenty steps" from it. One of these branches started from a spring in the side of the hill about the latter distance from the house. This stream ran through a small pool or watering place for horses by the side of the public road near the spring, about as large as a "washtub," thence on in front of plaintiff's house into the other branch. The other of these branches, which was larger, was also a spring branch, coming down from the hills near by with a considerable fall, thence, after reaching the low grounds and being joined by the first named branch, it passed around along at the back of plaintiff's house into the old canal bed. The privy of plaintiff was near the bank of the latter branch about fifty yards from the rear of his dwelling (according to one witness for plaintiff) and drained into the branch. There was not much fall in the larger branch as it passed near plaintiff's house, and while the water in it was fresh it moved in this locality sluggishly, with still water along its margin in places; and where the public road which passed in front of plaintiff's house crossed this stream, about fifty yards from the house, the mud thrown up from ruts cut by wagon wheels in passing over the road had a tendency to obstruct the stream, and following much rainfall the water would stand at this place, and (as the wife of plaintiff testified) would "become a sheet of water and people in the community would complain of it in going to the depot and getting their traffic out. The whole road would become a sheet of water * * *." The plaintiff himself testified, however, and so did his wife at another point

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in her testimony, that they could by clearing off the mud from the road prevent the last named ponding of the water, and that the custom was invariably to do so when they found the water was ponding there.

The water in the bed of the canal near plaintiff's house was not well drained off and was very stagnant and of much greater extent of surface in 1914 and 1915 than the still water in said branches, horse-watering place and spring near plaintiff's house.

In the year 1913, plaintiff and family lived in a different house from that above referred to, but only about "twenty steps" therefrom, and hence lived then in practically the same locality as in 1914 and 1915.

In 1913 the canal bed above referred to was kept well drained by defendant, and there were no mosquitoes present and no malaria in plaintiff's family. The evidence is silent as to whether there was much or little wet weather that year.

In 1914 such canal bed was not well drained, the ditch of defendant draining it being partly filled by washings from the hills brought down by the larger branch above named, and there was very little stagnant water which accumulated in such canal bed, but there were "millions of mosquitoes" present, and yet there was no malaria in plaintiff's family. There was not much wet weather that year.

In 1915 such canal bed was not well drained, the ditch aforesaid was more filled by the washings aforesaid, and there was stagnant water of greater quantity and surface than in 1914 which accumulated in such canal bed, there were "millions of mosquitoes" present, and there was the malaria in plaintiff's family. There was a great deal of wet weather that year.

The plaintiff's wife and daughter were taken sick with malaria in the latter part of July or first part of August,

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1915, and did not recover until cold weather in December of that year.

Defendant opened its ditches and well drained the canal bed referred to in August or September, 1915, and the canal was kept well drained by defendant from that time to the time of the trial of the case in the court below.

Plaintiff and his son were taken sick with malaria, in about three weeks of each other, about October, 1915, and recovered by the middle of December following.

At the time of the trial of the case in the court below, on June 27 and 28, 1916, there had been no return of malaria in any of plaintiff's family since their recovery from their sickness in December, 1915.

It is conceded by counsel for plaintiff as fully established by the evidence "that malaria is transmitted by the anopheles mosquito; (that) this mosquito must first derive the malarial germ from some person affected with malaria and then transmit it by inoculation to some other person." There is another species of mosquito, the culex, which the evidence shows does not transmit or cause malaria.

Dr. Harris, one of the physicians who attended plaintiff's family and also prescribed for plaintiff during their said illness, had examined the old canal bed aforesaid, but had not examined the spring and branches. He testified among the witnesses for plaintiff, and was asked a hypothetical question which covered the condition of the water in the spring and branches. The question concluded as follows:

"Given those conditions and the conditions that you saw in the canal bed, where would you say this malaria Mr. Catlett and his family had originated?"

His answer was as follows:

"That is a hard question for anybody to answer, because the malarial mosquito may breed anywhere, might travel

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most any distance; and it depends upon how long it might be between rains and between the stagnant water on the branch or around the spring or anywhere else; but from all the conditions I saw, not seeing the branch, I consider they would breed in the most favorable place, in the canal. That would be the best answer I can give."

The following should also be quoted from the continuation of the testimony of this witness:

By Mr. Moon:

"Q. Is it your opinion from what you saw there that this malaria came from the canal?

"A. From what I saw.

* * * * * * * * *

ON CROSS-EXAMINATION.

"By Mr. Leake:

* * * * * * * * * *

"Q. Isn't the still side pools of small streams, or swampy pools at the margin of ponds, or stagnant water in ditches, or beds of old canals, or the still water at the sides of a spring, and occasionally, though rarely, in old horse troughs —isn't that condition favorable for the production of the anopheles mosquito; or standing rain water, either standing on the ground or in receptacles?

"A. Yes, sir.

"Q. In fact anywhere water stands?

"A. Yes, sir, anywhere water stands will breed mosquitoes.

"Q. So that if, around a house such as Mr. Catlett's, there were conditions such as that in detail as you have just stated would be favorable to the breeding of mosquitoes, other than the old canal bed, would it be possible for you or anybody else to say which mosquito bit Mr. Catlett and his family?

"A. No, sir.

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REDIRECT EXAMINATION.

"By Mr. Moon:

"Q. Doctor supposing the conditions, which I detailed in my former hypothetical question, around the spring and along those branches and the horse-watering place and his privy, on the one hand, and the conditions that you said in the canal bed on the other, which would you say would be the more favorable for the production of mosquitoes?

"A. I would consider the canal the most favorable place."

It is shown by the evidence of the physician who testified for the defendant that "It is not the number of mosquitoes that gives a man malaria; it is not the bites you get. One will do it; of course, two will do it a little better if both of them are loaded with the malarial parasite." And there is no conflict in this testimony with any evidence introduced for the plaintiff. It is in accord with the evidence for the plaintiff.

SUMMARY OF FACTS.

The evidence for the plaintiff in this case does not go beyond proving by a preponderance of it, that the water in the canal bed in 1915, prior to its drainage in August or September of that year, was the most favorable place for the production of mosquitoes.

Such evidence also proves that the water in other places near by was favorable at such time for the production of a sufficient number of mosquitoes to have caused the malaria complained of, and that no logical conclusion of the whereabouts of the breeding place of the mosquitoes which caused the malaria complained of can be drawn from the fact that one place bred more than another.

The evidence establishes the further fact that the year 1915 was one of unusually wet weather.

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D. H. & Walter Leake and *Henry Taylor, Jr.*, for the plaintiff in error.

Moon & Pitts, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The instant case turns upon the question,—

1. Is there any probative evidence in the case tending to establish the fact that the breeding place of the mosquitoes which were the cause of the malaria complained of was the old canal bed aforesaid?

The question must be answered in the negative.

A fact cannot be established, whether by direct (testimonial) or circumstantial evidence unless there is some evidence which has some logical probative value to establish the fact. 1 Wigmore on Ev., secs. 20, 31, *et seq.*

It is very true that in civil cases the reasoning to establish a fact is not required to measure up to the exclusion of every other hypothesis consistent with the evidence; and it is required only that the fact considered as established be the more probable hypothesis from the evidence with reference to other possible hypothesis predicated upon the evidence—that is to say, in civil cases, a fact may be established by a preponderance only of the evidence. *Woods' Adm'x* v. *Southern Ry. Co.*, 104 Va. 650, 52 S. E. 371, and almost innumerable other cases which might be cited. But the preponderance of the evidence rule does not dispense with the requirement that there must be some evidence which has some logical probative value to establish a fact, before that fact can be even considered as a possible hypothesis predicated upon the evidence—*a fortiori*, before it can be considered as the more probable hypothesis from the evidence.

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In other words, the preponderance of the evidence rule can operate only upon hypotheses to establish which there is some evidence in the case of some logical probative value. No other hypothesis can be for a moment considered under this rule. The instant it is discovered that there is no evidence of any logical probative value to establish a given or suggested hypothesis, that instant such hypothesis must be discarded from consideration as a fact. So, in the instant case, as to the hypothesis that the breeding place of the mosquitoes which were the cause of the malaria complained of was the old canal bed aforesaid. As appears from the above statement of facts and summary of facts, the evidence in the instant case has no logical probative value to establish the fact that the breeding place of the offending mosquitoes was the old canal bed. At most, the evidence cannot go beyond establishing that the mosquitoes which caused the malaria complained of were probably bred, either in the water of the old canal bed (for which the defendant was responsible), or in the water of other places near by (for which the defendant was not responsible). Now, as bearing on the question whether it is more probable that the mosquitoes bred in the water of the old canal caused the malaria, or those bred in the other near-by places, we have only the isolated *datum,* or the sole fact that more mosquitoes were bred in the former place. If the number of the mosquitoes bred were a determining factor on this question, we would, of course, conclude that the mosquitoes bred in the former place were the more probable cause of the malaria. But we have the direct evidence in the instant case, above mentioned, that the number of the mosquitoes bred is not a determining factor on such question. We have, moreover, the obvious fact that evidence of mere numbers of mosquitoes bred in a given place can have no probative value whatsoever to identify the breeding place of the offending mosquitoes, when there were other places, equally probable

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as places of origin, where mosquitoes as shown by the evidence were probably bred in sufficient numbers to have caused the malaria. And it inheres in the very nature of the case that this is so. It is necessarily so because the identity of the breeding place of the insects in question is lost in the obscurity of their own utter lack of known or ascertainable marks or characteristics (if any such exist) by which those bred in one place may by any possibility be distinguished from those bred in another place, when we have the data aforesaid furnished by the evidence of different places from which it was equally as possible and probable that they came in sufficient numbers to have caused the malaria. There is, therefore, no evidence in the instant case to show that the one breeding place was more probable than the other of the mosquitoes which caused the malaria complained of.

In other words, in the instant case, the verdict of the jury in finding the fact in question was necessarily based upon "conjecture, guess or random judgment upon mere supposition." *Chesapeake and Ohio Railway Co.* v. *Heath*, 103 Va. 64, 66, 48 S. E. 508. The inference that the mosquitoes which caused the malaria complained of were bred in the bed of the old canal was not proved as a fact in the case, and in the very nature of the subject under the circumstances of the instant case could not by any possibility have been so proved. In such case, the rule that "an inference cannot be drawn from a presumption, but must be founded upon some fact legally established," applies. (See *Chesapeake and Ohio Railway Company* v. *Ware, post* 246; 95 S. E. 183, in which the opinion of this court is handed down at the present term.)

What has been said above is crystalized and stated in another way in the following rule referred to by Buchanan, J., in delivering the opinion of this court in *Norfolk and Western Railway Company* v. *Poole*, 100 Va. 148, at pp.

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153-4, 40 S. E. 627, at p. 629: "When damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by the preponderance of the evidence."

Counsel for the plaintiff make use of the arguments known in logic as the "method of agreement" and "method of difference," and urge with much force and ability that in 1913 when the canal bed was kept well drained, there were no mosquitoes and no malaria; that in 1914, contemporaneously with stagnant water in the canal bed, "millions of mosquitoes appeared and this continued throughout the remainder of the year 1914 and the year 1915, until this stagnant water was removed by appellant by drainage, and as soon as the stagnant water in the canal was removed, the mosquitoes disappeared," and that appellee and his family "as soon as the stagnant water was drained from the canal bed and the mosquitoes disappeared * * * recovered from their malaria and have had none since." But the infirmity of these methods of argument, as justly observed and in substance expressed by Mr. Wigmore in his learned and valuable work on Evidence, lies in this, that the failure of the phenomenon to occur in any single instance, when the data relied on to produce it are present, or its occurrence in a single instance, when the data relied on to produce it are absent, is fatal to the argument. In 1913, it is true, the mosquitoes and the stagnant water in the canal were not present, and the phenomenon of the malaria in plaintiff's family did not occur; but in 1914 this data, to the extent of producing "millions of mosquitoes," were present, and the phenomenon of the malaria

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did not occur. Again, in 1915, the data of the stagnant water in the canal and the "millions of mosquitoes" were present and the phenomenon in question did occur; but this single instance is offset by the experience aforesaid of 1914, when with the same data aforesaid then present, such phenomenon did not occur. And as to the disappearance of the mosquitoes and the malaria when and since the canal was well drained, the position of counsel for plaintiff is not precisely accurate. The plaintiff and his son were not taken sick with malaria until after the canal was well drained in August or September, 1915, and at such a length of time after that time that it would seem to be indicated by a preponderance of the evidence that they were not infected by mosquitoes from the canal bed but from mosquitoes bred at some other place. Certainly this must have been so if all the mosquitoes from the canal bed disappeared as soon as it was drained, which was in August or September, 1915. Here again in the absence of the data relied on by plaintiff to produce the phenomenon, we find that the phenomenon occurs. And as to the non-recurrence of the sickness from malaria since the recovery of plaintiff and his family, this was brought out in evidence on the trial in June, 1916. The malarial illness complained of in 1915 did not begin until the latter part of July or first of August. No logical argument, therefore, could be based on its non-recurrence when only the period of June in 1916 had been reached.

Moreover, the argument of counsel for plaintiff ignores the further data furnished by the evidence, that there was unusually wet weather in 1915 when the malaria in question occurred, which probably introduces the presence or absence of unusually wet weather conditions into the problem of ascertaining the more probable cause of the malaria. However, the evidence is meagre on this subject, as it is upon the subject of other data necessarily entering into the

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problem, and is plainly insufficient to warrant any reliable conclusion based upon evidence of facts.

As the physician who testified as an expert witness for the plaintiff, in effect, frankly said, concerning the instant case as disclosed by all the evidence for plaintiff, it was impossible for the witness or anyone else to say whether the mosquitoes, which bit Mr. Catlett and his family, and caused the malaria complained of, were bred in the old canal bed or elsewhere; so we are compelled to say from this evidence.

It is urged in behalf of the plaintiff that the result of such a holding in the instant case will be to set at naught the requirement of the statute above mentioned that the defendant shall so drain the old canal bed "as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected." We do not so regard the case. The discharge of the duty in question can be fully enforced, if need be, by the appropriate remedy of mandamus.

For the reasons stated above, the verdict and judgment complained of must be set aside and annulled and a new trial granted in accordance with the prayer of the defendant, to be had, if the plaintiff is so advised, not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond.

CHESAPEAKE AND OHIO RAILWAY COMPANY v. WARE.

January 24, 1918.

1. FIRES—*Railroads—Allegation of Negligence.*—Under the Featherston act (Acts 1908, page 388), it is not necessary in an action for damages by fire against a railroad for the plaintiff to allege that the fire was negligently set out by the defendant, and such allegations in a declaration may be regarded as surplusage.
2. APPEAL AND ERROR—*Objections to Evidence—Evidence other than that Objected to Sufficient to Sustain Verdict.*—Where the evidence in the case, independent of testimony drawn in question by two assignments of error, was sufficient to sustain the verdict of the jury, it is unnecessary for the appellate court to pass upon the questions raised by these assignments of error.
3. FIRES—*Evidence—Evidence in Possession of Defendant—Presumption.*—In an action against a railroad company for damages from fire set out by an engine of the company, there was no direct evidence that any engine of any train of defendant passed the point where the fire originated shortly before the fire. The evidence for the plaintiff on this point was wholly circumstantial. It consisted in proving that a mail train of the defendant was, by its schedule of trains, due to pass along by such point at such time.

   Held: That, in view of the fact that definite evidence of the exact time at which the train passed was peculiarly within the possession of the defendant, being furnished by its record of the movement of its trains, the testimony for plaintiff furnished *prima facie* evidence of the fact that the train ran on time on the day in question, and hence passed the point of origin of the fire a short time before the fire originated. The defendant having failed to introduce any evidence to rebut the *prima facie* proof aforesaid, such proof became conclusive of the fact in question.
4. PRESUMPTIONS AND BURDEN OF PROOF—*Circumstantial Evidence—Inference from a Presumption.*—All facts which are proved in a case in the same manner as if they were the very facts in issue—that is, by evidence of logical probative value, either direct (testimonial) or circumstantial, may serve as a basis

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from which further inference may be drawn. Since all facts in issue may be proved by circumstantial evidence, as well as by direct or testimonial evidence, and every fact proved by circumstantial evidence is but an inference from such evidence, where a fact is proved in a case as a fact, although by inference from circumstantial evidence, such fact may itself be taken as a basis for a new inference of fact.

5. FIRES — *Circumstantial Evidence — Inference.*—Notwithstanding that there was no direct evidence before the jury that a train had in fact passed the point of origin of the fire at or about the time of the fire in question, where such fact was established by circumstantial evidence, the jury may infer from the fact of the passage of the train at that time, in connection with other facts, that the fire was set out by the train as it passed the point of origin of the fire.

Error to a judgment of the Circuit Court of the city of Williamsburg and county of James City, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

This is an action of trespass on the case by the defendant in error (hereinafter referred to as plaintiff), against the plaintiff in error (hereinafter referred to as defendant), seeking to recover damages to certain timber on the land of plaintiff adjacent to the railroad right of way of the defendant, caused, as is alleged, by a fire set out by the defendant on the ..... day of April, 1915.

The declaration contained three counts. There was a demurrer to the declaration and to each count thereof, which was overruled by the trial court.

The allegations drawn in question by the demurrer were in substance as follows:

Each count undertook to charge both that the defendant set out the fire and that it negligently did so.

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The grounds of demurrer are, in substance, that all of the counts were insufficient in that they did not charge facts from which the negligence aforesaid could be inferred.

In addition to the allegations aforesaid of negligence, the first and second counts alleged that the fire was set out by the defendant "by a spark emitted from" one of its engines, and the third count alleged that the fire was set out by the defendant "by a spark from" one of its engines. None of the grounds of demurrer challenges the sufficiency of such counts to allege the fact that the fire was set out by a spark dropped or thrown from one of defendant's engines.

There was a trial by jury; a demurrer to evidence by the defendant; and a verdict of the jury subject to such demurrer. Such demurrer was overruled by the trial court.

THE MATERIAL FACTS, ETC.

The facts and certain material details of evidence bearing on the material questions of fact raised by the assignments of error, are as follows:

(a) Concerning the place of origin of the fire, in reference to its proximity to the railroad of the defendant:

The testimony for the plaintiff did not of itself fix the place of origin of the fire. But that testimony, when considered along with the testimony of J. C. Williamson, a witness for defendant, who after the fire examined the area burned over (which testimony is not in conflict but in accord with the evidence for the plaintiff), was sufficient to warrant the jury in finding the fact to be that the fire originated on the north side of the railroad (on the same side of it as plaintiff's said land), either upon plaintiff's land or upon a small point of timbered land of a neighbor of his adjacent to the railroad and to plaintiff's land, and

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at a place sufficiently close to the railroad for it to have been set out by a spark from one of the locomotive engines of the defendant.

(b) Concerning the question of fact whether a locomotive engine of the defendant, drawing its mail train, passed along by the point of origin of the fire a short time before it originated:

There was no direct evidence in the case that any engine of any train of defendant passed said point at the time in question. The evidence for the plaintiff on this subject was wholly circumstantial. It consisted in proving that a mail train of the defendant was, by its schedule of trains, due to pass along by such point at such time. The direct evidence on this point may be best illustrated by extracts from the testimony of the plaintiff's witnesses on the subject as follows:

One of such witnesses testified:

"Q. Had any trains of the C. & O. passed by there at any time—close to that time, before that?

"A. I didn't notice any trains, but I think there is some scheduled about that time."

The other witness for plaintiff on this subject, who noticed the fire somewhat later than the former witness, testified:

"Q. Do you know of any train that had passed there?

"A. I never took any notice of it. I live right there and they pass and repass and I don't take any notice of them, but it was a 11 o'clock train that would have gone by some time when I saw the fire.

"Q. The 11 o'clock train had gone by some time?

"A. Yes, sir.

"Q. The 11 o'clock train is what train?

"A. That is a mail train, a fast train. Somewhere around about 11 o'clock. We always call it the 11 o'clock train."

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The defendant introduced no evidence on the subject of whether the train in question passed said point at the time in question.

(a) Concerning the question of fact whether there was any other causal agency for the origin of the fire than a spark from the engine of said mail train of defendant:

There is no evidence in the case of any other cause of the fire other than that tending to show that it was set out by a spark thrown from the engine of said mail train of defendant.

S. O. Bland, R. G. Bickford and *Henry Taylor, Jr.*, for the plaintiff in error.

Frank Armistead and *Ashton Dovell*, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

1. In regard to the position taken by the demurrer, mentioned in the above statement, that the declaration was insufficient in its charges of negligence in the respective counts thereof, the following is deemed sufficient to say:

Since, under the Featherston act (Acts 1908, p. 388), it was not necessary for the plaintiff to have alleged that the fire was negligently set out by the defendant (*N. & W. Ry. Co.* v. *Spates*, 94 S. E. 195), the allegations of such negligence drawn in question by the demurrer may be regarded as surplusage. Therefore, it is unnecessary for us to inquire whether such allegations were sufficient allegations of such negligence. Further, as the demurrer does not challenge the sufficiency of the declaration to allege the setting out of the fire under the Featherston act, that question is not raised by the demurrer, and it is unnecessary for us to consider that question.

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We, therefore, find no error in the action of the trial court in overruling the demurrer.

2. There are two assignments of error raising important and interesting questions arising from the action of the trial court in permitting certain testimony to be introduced before the jury by the plaintiff, over the objections of the defendant, relied on by the former as evidencing an express admission, and admissions by conduct of the latter, of its liability. In the view we take of the case, however, as hereinafter set out, we consider that the evidence in the case for plaintiff, independent of the testimony drawn in question by the two assignments of error here referred to, was sufficient to sustain the verdict of the jury. Therefore it is unnecessary for us to pass upon the questions raised by such assignments of error.

3. In addition to the material facts above stated, it should be added, perhaps, for a better understanding of the instant case, that the fire was first discovered by a witness who was about three-fourths of a mile therefrom at the time he discovered it; that this witness first observed a "tremendous smoke" and got to the fire as quickly as he could afoot and found the fire burning on plaintiff's land about 150 or 200 yards from the right of way of defendant; that the fire was then coming from the direction of such right of way, going with the wind, which was at the time blowing from said right of way towards plaintiff's land; and that witness gave it as his opinion (unobjected to) that he did not think the fire had been burning ten minutes when he saw it.

These facts taken in connection with the facts stated in paragraphs (a) and (c) of the statement of material facts above (which are, in substance, that the fire originated sufficiently close to the railroad for it to have been set out by a spark from the engine of the mail train of defendant above referred to, and that there was no evidence in the

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case of any other cause of the fire), bring this case within the holdings of this court in *C. & O. Ry. Co.* v. *May*, 120 Va. 790, 92 S. E. 801, and *Atlantic, etc., R. Co.* v. *Watkins*, 104 Va. 154, 51 S. E. 172, to the effect that the circumstances attending the commencement of the fire warranted the jury in finding that the fire was set out by said passing train of the defendant, as charged in the declaration, *if* the evidence set out in paragraph (b) of the statement of facts and evidence above was sufficient to warrant the jury in *inferring*, and thus finding, it to be a fact that such train did pass along by the point of origin of the fire a short time before the fire originated. Therefore, the turning point in the case, upon the issue of fact as to whether the defendant set out the fire as charged in the declaration, is the question,—

4. Was the evidence set out in paragraph (b) above sufficient to warrant the jury in inferring, and thus finding, it to be *a fact*, that said train did pass along by the point of origin of the fire a short time before the fire originated?

Upon this question two positions are taken for the defendant. They are, in effect, as follows:

(1) That the evidence set forth in said paragraph (b) is insufficient to warrant the jury in making the inference of fact that the train did pass along as aforesaid at the time in question; that the scheduled time of the train proves nothing; that it may have been on time or it may have been late. It may have passed at or about the time in question or three hours afterwards or not at all that day. That the evidence wholly fails to show these facts and leaves the question at issue open to mere surmise and conjecture.

(2) That there being no direct evidence before the jury that the train did in fact pass at or about the time in question, the most that can be said to sustain the verdict of the jury in this particular is that the jury might have inferred or presumed from the circumstantial evidence before them

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that the train did so pass. That was an inference or presumption and that the jury could not upon this inference or presumption base another inference that the fire was set out by this train as it passed the point of origin of the fire.

As to the first (1) position taken for defendant above mentioned:

The testimony for plaintiff as to the time of passing of the train tended to prove such time and was as definite evidence as the plaintiff could produce on this point, without resorting to calling the defendant itself, through its agents or records, to testify in the case. The plaintiff's witnesses on the subject, living as they did close by the railroad, and having grown accustomed to the passing of trains, were naturally, as a rule, unconscious of their passing, and so could not be expected to testify with more definiteness than they did on that subject. In this situation, and in view of the fact that definite evidence of the exact time at which the train passed was peculiarly within the possession of the defendant, being furnished by its record of the movement of its trains, the testimony for plaintiff furnished *prima facie* evidence of the fact that the train ran on time on the day in question, and hence passed the point of origin of the fire a short time before the fire originated. The defendant having failed to introduce any evidence to rebut the *prima facie* proof aforesaid, such proof became conclusive of the fact in question. 1 Wigmore on Ev., section 285, and authorities cited.

As quoted by the learned author of the work last cited, Lord Mansfield, C. J., said in *Blatch* v. *Archer*, Cowp. 66: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." And as also quoted by the same learned author above referred to, Best, J., speaking of a

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presumption of fact arising from evidence introduced by one party, which evidence is in itself inconclusive, said in *R.* v. *Burdett*, 4 B. & Ald. 122: "If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just."

As to the second (2) position for defendant, above mentioned:

The rule that "an inference cannot be based upon a presumption," or, what is the same rule, that "an inference cannot be based upon an inference," is invoked as fatal to the plaintiff's case. It is urged with much ability and force by counsel for defendant that, in the consideration of circumstantial evidence, an inference cannot be based upon an inference or presumption. That an inference or presumption cannot form the basis of fact from which another inference of fact may be drawn. That at most, in the instant case, all that can be said is that the jury were warranted in drawing the inference or presumption that the train passed as aforesaid. That there is no *direct* proof of it as a fact. That only from facts which have been proved by *direct evidence* can the jury properly draw an inference of fact. Hence, the jury could not use this inference or presumption that the train passed as aforesaid as an intermediate fact from which to make a second inference that the fire originated from the train.

We are cited on this point only to the cases of *C. & O. Ry. Co.* v. *Heath*, 103 Va. 64, 48 S. E. 508, and *N. & W. Ry. Co.* v. *Cromer*, 99 Va. 763, 40 S. E. 54. The statement in these cases of the rule invoked is this: "An inference cannot be drawn from a presumption, but must be founded upon some fact legally established." The latter case quotes this rule from Bailey on Personal Injuries (1st ed.), section 1675.

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The rule referred to is firmly established and is a correct and wise rule when correctly applied.

Referring to the rule that an inference cannot be drawn from an inference or presumption, McCabe, J., in delivering the opinion of the court in *Hinshaw* v. *State*, 147 Ind. 334, at p. 363, 47 N. E. 157, 166, says: "There is an important exception to that rule however. *A fact* in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of *a proved fact*. Burrill Civ. Ev., p. 138; Best on Pres., section 187; 1 Greenl. Ev., section 34." (Italics supplied.) Reference to the authorities cited by Bailey on Personal Injuries, *supra*, and to the two Virginia cases cited, *supra*, makes it clear that the presumption or inference referred to in the rule in question is a presumption or inference which may and often should be drawn but which in the case in which the rule in question is applied is not *a proved fact*. If the inference or presumption is based on such evidence that it may be regarded as *a fact proved* in the case, then, although the evidence on which it is based may be circumstantial evidence, such inference or presumption of fact may itself form the basis for another inference of fact, equally as if it had been proved by direct evidence. I Wigmore on Ev., section 41.

The last cited learned author dealing with the rule under consideration unqualified by the exception above referred to, says:

"It was once suggested that an 'inference upon an inference' will not be permitted, *i. e.*, a fact desired to be used circumstantially must itself be established by testimonial" (direct) "evidence; and this suggestion has been repeated by a few courts and sometimes actually enforced. There is no such rule, nor can be. If there were, hardly a single trial could be adequately prosecuted. * * * All departments of reasoning, all scientific work, every day's life, and

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every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impractical limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein relied upon."

It should be noted that an examination of all of the cases cited by the learned author last quoted to that portion of the text above set forth which alludes to the unqualified rule that "an inference upon an inference" has been repeated by a few courts and sometimes actually enforced, discloses that all of such cases which repeat and those which enforce the rule mentioned, either contain a quotation from Starkie Ev., section 57, or refer to cases which do contain that quotation. The latter quotation is as follows: "In the first place, as the very foundation of indirect proof in the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, in the same manner as if they were the very facts in issue." Here seems to be the source, so far as we have discovered it, of the misconception which has arisen in the few cases where the rule has been enforced unqualifiedly, referred to by Mr. Wigmore. The word *"direct"* is underscored in the quotation from Starkie on Evidence as found in one of the earliest cases we have examined containing it. We have not had access to the edition of Starkie on Evidence containing this language. Mr. Wigmore cites the edition of 1824. The text of Mr. Starkie, quoted as aforesaid, is undoubtedly misleading. But the text itself, upon a careful reading of it, discloses that the *direct* evidence therein referred to is not *direct evidence* in the usual (but as Mr. Wigmore says in the incorrect) meaning with which that phraseology is used, distinguishing such evidence from circumstantial evidence. (Mr. Wigmore avoids this confusion by designating the former evidence as *"testimonial* evidence"). The concluding portion of the

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text quoted from Mr. Starkie shows, however, that he means to say that all facts which are proved in a case "in the same manner as if they were the very facts in issue" (that is, by evidence of logical probative value, either direct [testimonial] or circumstantial) may serve as the basis from which further inference of fact may be drawn. This, as we have seen, is the true rule and is in accord with the great weight of authority. And since all "facts in issue" may be proved by *circumstantial* evidence, as well as by *direct* or testimonial evidence, and every fact proved by circumstantial evidence is but an inference from such evidence, Mr. Starkie in truth says that where a fact is proved in a case *as a fact*, although by inference from circumstantial evidence, such *fact* may itself be taken as the basis for a new inference of fact.

Indeed, when we consider the rule as stated by Bailey on Personal Injuries—*i. e.*, "An inference cannot be drawn from a presumption, but must be founded upon some fact legally established"—we see that the concluding portion of the sentence carries the same meaning as the quotation from Mr. Starkie when correctly understood, and as that expressed in *Hinshaw* v. *State*, *supra*, above set forth.

In the instant case the inference that the train passed as aforesaid, must be regarded, as aforesaid, as a proved fact; hence, although proved by circumstantial evidence, it might have properly formed (in connection with the other facts) the basis for another inference of fact by the jury, to-wit, the inference that the fire was set out by the said train as charged in the declaration.

We must conclude, therefore, that neither of the positions (1) or (2) above mentioned as taken for defendant, can be sustained, and the question 4 under consideration must be answered in the affirmative.

For the foregoing reasons the judgment complained of must be affirmed.

Affirmed.

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Richmond.

CITY OF PORTSMOUTH v. PORTSMOUTH AND NORFOLK CORP.

January 24, 1918.

1. MUNICIPAL CORPORATIONS—*Grant of Franchise—Requiring Deposit of Check as Prerequisite to Bidding.*—A city ordinance authorizing the granting of a franchise for lighting the streets, etc., of the city required each bidder to accompany his bid with a certified check payable to the city treasurer in the sum of $5,000, to be forfeited to the city as liquidated damages should he fail to comply with his bid and execute the contract in the event of his bid being accepted.

   Held: That, this provision of the ordinance did not violate section 125, Article VIII, of the Constitution of 1902, nor section 1033-f of the Code of 1904.

2. MUNICIPAL CORPORATIONS—*Grant of Franchise—Requiring Deposit of Check as Prerequisite to Bidding—Bond Required by Section 1033-f.*—The bond provided for in section 1033-f, Code of 1904, is required for the franchise and for the discharge of the duties thereby imposed in conformity with the statute, whereas the certified check, required by the ordinance in the instant case, was intended to insure the execution of the contract, and in case of failure, to indemnify the city by way of liquidated damages for the breach. There is nothing either in the Constitution or statute which forbids such stipulation, and the requirement is not unusual in transactions of this kind.

3. MUNICIPAL CORPORATIONS—*Extension of Time to Bidder for Municipal Franchise—Amendment of Franchise.*—An ordinance extending additional time to a company for supplying municipal lighting, the company having been awarded as the lowest bidder a franchise for lighting the streets, etc., of the city, was not an amendment of the original franchise, and, therefore, illegal for noncompliance with paragraph 5 of section 1033-f of the Code of 1904. The ordinance was adopted on application of the corporation; and besides it was not an amendment or extension of the franchise, but simply an extension of time on *the contract*, within which to furnish municipal lighting, and the city was within its rights in granting the indulgence.

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Error to a judgment of the Circuit Court of the city of Portsmouth, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Jno. W. Happer, for the plaintiff in error.

R. R. Hicks, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

The common council of the city of Portsmouth, pursuant to Code, section 1038, passed an ordinance authorizing the granting of a franchise for lighting the streets, etc., of the city, which was approved by the mayor March 6, 1909.

Section 4 of the ordinance provides: "All bidders are to be invited to make their bids upon a ten-year franchise with a ten-year contract, and a twenty-year franchise with a ten-year contract; and each bidder is required to accompany his bid with a certified check payable to the city treasurer in the sum of five thousand dollars—to be forfeited to the city as liquidated damages should he fail to comply with his bid and execute the contract hereby required in the event of his bid being accepted; but should his bid be not accepted then the said check is to be returned to him."

The Portsmouth and Norfolk Corporation, defendant in error, was the sole bidder and filed with its bid a certified check for five thousand dollars, as required by the ordinance. The council, by subsequent ordinance, in accordance with the statute, awarded the franchise and contract to defendant in error, and directed the city attorney to prepare the contract, which was done, and it was dated and duly executed on the part of the city May 25, 1910. But defend-

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ant in error, admittedly, by reason of its inability to finance the undertaking and for no other cause, declined to execute the contract. Thereupon, the council, on July 14, 1910, adopted a resolution forfeiting the certified check, and placed the proceeds to the city's credit.

On April 9, 1915, four years, eight months and twenty days after the alleged cause of action accrued, the Portsmouth and Norfolk Corporation brought assumpsit against the city to recover the amount of the check. The defendant demurred to the declaration, and plead the general issue, and filed a special plea setting up the three years limitation as a bar to the action. The whole matter of law and fact was submitted to the court, which rendered judgment for the plaintiff. The essential contentions of defendant in error for affirming the judgment are these:

1. "That the requirement that the bidder should deposit his check for $5,000 as a prerequisite to bidding for a public franchise is contrary to the Constitution of the State of Virginia and laws passed in pursuance thereof, and thus having been acquired by the city illegally, the city had no title to the check and it remained the property of the corporation."

This proposition is based upon misapprehension of the facts upon which it is predicated. Section 125, Article VIII, of the Constitution (Code 1904, p. ccxli) ordains, that "Before granting any such franchise or privilege for a term of years, except for a bridge or railroad, the municipality shall first, after due advertisement, receive bids therefor, publicly, in such manner as may be approved by law, and shall then act as may be required by law."

Code, section 1033-f, provides, "* * * that the person or corporation to whom any such franchise, right or privilege is awarded, whether by competing bids or otherwise, shall first execute a bond with good and sufficient security in favor of the city or town, in such sum as said city or town shall

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determine, conditioned upon the constructing and putting into operation and maintaining the plant or plants provided for in the franchise, right, or privilege granted."

The bond is required for the franchise and for the discharge of the duties thereby imposed in conformity with the statute. The certified check, on the other hand, was intended to insure the execution of the contract, and in case of failure, to indemnify the city by way of liquidated damages for the breach. There is nothing either in the Constitution or statute which forbids such stipulation, and the requirement is not unusual in transactions of this kind.

Judge Dillon in his work on Municipal Corporations, says: "After the opening of the bids, the ascertainment of the lowest and most favorable bidder, and the adoption of a resolution that the contract be awarded to him, does not make a completed contract between the municipality and the bidder, where the charter requires that all contracts relating to city affairs shall be in writing, or where the advertisement so specifies, or where some further step remains to be taken. * * * Where a bidder accompanies his bid for the performance of a public work with the deposit of a certain sum under an agreement to forfeit the sum deposited in case of his neglect or refusal to enter into the contract for the work, and without default on the part of the board he fails to execute the contract, he cannot recover back his deposit and the board may declare the same forfeited." 2 Dillon on Mun. Corp. (5th ed.), section 810; cited with approval in *Baltimore* v. *Robinson*, 123 Md. 660, 91 Atl. 682, L. R. A. 1915-A, 225, Ann. Cas. 1916-C, 425.

So, McQuillin on Mun. Corp., section 1221, says: "It is frequently required that bidders for public contracts accompany their bids with a deposit or other security of a prescribed amount, as a guaranty that they will meet the requirements of their bids. When so required it is generally held necessary to the validity of the bid that the security

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be submitted with the bid and be of the kind designated." And in note 11 it is said: "Such a requirement is a valid regulation of the conduct of municipal business"—citing *Wheaton, etc., Co.* v. *Boston,* 204 Mass. 218, 90 N. E. 598. So, also, the same author, at section 1221, page 2677, says: "Money accompanying a bid as security that a bidder will enter into a contract if his bid is accepted, cannot be recovered back if the bidder fails to enter into the contract. The rule that courts incline against forfeitures has no application to such a case, and the rule is never carried to the extent of relieving parties against the express terms of their own contracts."

2. This contention, in substance, is that defendant in error's check was deposited with a bid that was never accepted by the council of the city; and that the franchise granted materially varied from the original bid. In contravention of this allegation, the record affirmatively shows that there is no such variance between the franchise granted and the bid; and, moreover, that the committees of both branches of the council reported favorably upon the bid, and the report was adopted by the common council on May 11, 1909, and by the board of aldermen on May 18, and approved by the mayor on May 22, following.

3. The contention that the ordinance of April 23, 1910, extending additional time to the company for supplying municipal lighting, was an amendment of the original franchise, and, therefore, for non-compliance with paragraph 5 of section 1033-f, was illegal, is without merit. The second paragraph of the resolution shows that it was adopted on application of the corporation; and besides it was not an amendment or extension of the franchise, but simply an extension of time on *the contract* within which to furnish municipal lighting, and the city was within its rights in granting the indulgence.

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4. All of the foregoing contentions are intended to lead up to the proposition that the city's claim to the proceeds of the five thousand dollar check was tortious. Consequently, that the correct limitation governing an action for its recovery was five years under section 2920, as the city maintains. Since, however, we are of opinion that plaintiff in error was rightfully entitled to the fund in controversy in any aspect of the case, the judgment must be reversed, and judgment entered for the plaintiff in error, the city of Portsmouth.

Reversed.

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Richmond.

FITZGERALD v. SOUTHERN FARM AGENCY.

January 24, 1918.

1. VENUE—*Real Estate Brokers—Action by Broker for Commission—Where Cause of Action Arises.*—Defendant, the owner of a farm, entered into a contract with plaintiff, a real estate agent, under which plaintiff was to receive a certain commission for negotiating the sale of defendant's farm at a certain price. The contract was entered into, signed and delivered in the city of Lynchburg, where plaintiff's real estate office was, and the farm was situated in Buckingham county, where plaintiff lived. Plaintiff obtained a purchaser for the farm, but at a lower price than that authorized by his contract with defendant, and a supplemental contract was entered into between plaintiff and defendant in Buckingham county, whereby defendant agreed to accept the lower price and plaintiff agreed to accept a smaller commission.

   Held: That, the later agreement between the parties, entered into in Buckingham county, whereby the selling price and the commissions were changed, was merely a modification of the original agency contract; and, as the primary contract of agency was made in Lynchburg, at least a part of the cause of action arose there; and, as section 3215 of the Code of 1904 authorizes the bringing of an action "in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein," the Corporation Court of the city of Lynchburg had jurisdiction of an action of assumpsit by plaintiff against defendant for his commission.

2. ABATEMENT AND REVIVAL—*Duplicity.*—A plea in abatement set up as a defense that neither the cause of action, nor any part of it, arose within the jurisdiction of the trial court, and also that at the time of the service of the writ upon the defendant, defendant was within the jurisdiction solely for the purpose of defending another suit brought against him by the plaintiff.

   Held: That the plea was bad for duplicity.

3. ABATEMENT AND REVIVAL—*Duplicity.*—Where a plea in abatement presents two distinct and sufficient defenses, either of which, if true, would necesaitate a finding on the issue in favor of the pleader, the plea is bad for duplicity.

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4. APPEAL AND ERROR—*Harmless Error—Instructions—Substitution of Instructions.*—Although an instruction requested by defendant was correct as a statement of abstract legal propositions, and the court would not have erred in giving it, there was no reversible error in the substitution of another instruction which was a clear, correct and adequate statement of the law from the defendant's standpoint as applied to the facts of the case in hand.

Error to a judgment of the Corporation Court of the city of Lynchburg, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Byrd, Fulton & Byrd, Robert G. Hundley and *Hubard. Gayle & Boatwright,* for the plaintiff in error.

Aubrey E. Strode, for the defendant in error.

KELLY, J., delivered the opinion of the court.

On the 30th of May, 1914, J. H. Fitzgerald, desiring to sell his farm, entered into a written contract with William Beasley, a real estate agent doing business under the name of Southern Farm Agency. Fitzgerald resided in Buckingham county, where the farm was situated. Beasley's real estate office was in the city of Lynchburg, and the contract was signed and delivered there. It was as follows:

"To the Southern Farm Agency: Gentlemen: We hereby authorize you to sell and execute the customary preliminary contract of sale for the within described property (referring to an accompanying written description) being the same land conveyed by deed duly recorded, at the price of $35,000 payable $..... cash and balance in equal installments, payable in one, two and three years, the deferred

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payments to carry interest at the rate of six per centum per annum, payable annually, and to be secured by deed of trust on the property.

"If the property is sold at and on the foregoing price and terms or such different prices and terms as may be agreeable to the owner by you or as the result of your influence or introduction, you are to have a commission of five per centum of the selling price, which is hereby assigned to you, and is to be paid out of the first money coming from the purchaser. If the property is exchanged, you are to have five per centum commission on the above valuation. We reserve the right to sell the property ourselves or through other agents to any one whose attention was not called to the property by you.

"You are to be given fifteen days' written notice of the withdrawal of the property, but if at any time it is sold to a party whose attention directly or indirectly was called to it by you, you are still to get your commission. We hereby waive our exemption as to these obligations."

Beasley brought the property to the attention of one C. E. Dawson, a citizen of Illinois, and after considerable time and labor expended in negotiations and in trips to Buckingham county with Dawson to visit the farm and its owner, Beasley obtained from Dawson a written offer of purchase at the price of $27,000, subject to certain terms and conditions specified in the offer and not necessary to be repeated here.

This offer was written and signed in Nelson county where Dawson was temporarily located, and was carried by Beasley to Fitzgerald in Buckingham county, where the latter accepted the same, subject to certain conditions set out by him in his written acceptance. On this occasion, however, he informed Beasley that if the sale was made at $27,000, the commissions thereon would have to be reduced

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from 5%, as fixed in the original contract of agency, to a flat sum of $1,000. Beasley agreed to this, and thereupon he and Fitzgerald signed the following agreement:

"It is hereby agreed that in case sale is made of J. H. Fitzgerald's farm to C. E. Dawson for $27,000 the Southern Farm Agency is to have a commission of $1,000 in full of all claims for commissions against said Fitzgerald, but leave is given said Southern Farm Agency to price and sell the property for any sum over $27,000 they may see fit and all excess over $26,000 that they get is to go to them as their commission."

Beasley returned to his office in Lynchburg, where he met Dawson the next day and procured from him a slightly qualified acceptance of the conditions imposed on his original offer by Fitzgerald. Dawson and Beasley then proceeded again to Buckingham county, where they met Fitzgerald, and where, after some further parleying, Dawson withdrew all qualifications from his acceptance of the conditions insisted upon by Fitzgerald, and the contract between them was thus finally closed.

Subsequently, Fitzgerald claimed that he was mentally incompetent to make the contract, and declined to convey the farm in accordance therewith. Dawson was ready to perform on his part, but decided to end the matter so far as he was concerned, and did so by a letter to Fitzgerald, in which, among other things, he said: "I am unwilling to become involved in any litigation with you about the matter, though I am advised that I could easily force you to live up to the contract and let me have the land, so I hereby notify you that the deal between you and me is off, and I have this day been paid by the Southern Farm Agency the $500 which I placed in their hands on account of the cash payment of your land."

Beasley claimed that he had done all his contract required to entitle him to his commission, but Fitzgerald refused to

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recognize the claim, and Beasley then brought this action of assumpsit in the Corporation Court of the city of Lynchburg. There was a verdict and judgment in his favor for $1,000, to which this writ of error was awarded. For convenience, we shall hereafter designate the parties, respectively, as plaintiff and defendant, in accordance with their position in the lower court.

The first assignment of error calls in question the action of the trial court in dismissing the defendant's plea in abatement No. 1, which set up as a defense, "that the supposed cause of the said action did not, nor did any part thereof, arise in the said city of Lynchburg, but that the supposed cause of the said action and every part thereof, did arise within the county of Buckingham, and at the time of the issuing of the said writ in this cause, the said defendant did not reside in the said city of Lynchburg, but that he did then reside, and has ever since resided, and does now reside, in the county of Buckingham."

Issue was joined upon this plea, and the court found, upon a submission to it of all matters of law and fact thus arising, that the cause of action, or a part thereof, arose in the city of Lynchburg, and that, therefore, under section 3216 of the Code, authorizing the bringing of an action "in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein," the plea was bad.

It is conceded, as of course it must be, that there was no error in this ruling if the court was right in finding as a fact that the cause of action or some part thereof arose in Lynchburg. Counsel for defendant have presented us with an argument, ably and resourcefully constructed, to show that the cause of action and every part thereof arose, as the plea alleges, in Buckingham county. This argument rests upon the contention that Beasley's right to commissions depended upon his agency contract with Fitzgerald and his produc-

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tion of a purchaser thereunder bound by a valid contract, and upon the further contention that both the contract of agency and the contract of sale were made wholly within the county of Buckingham. The infirmity in the argument lies, as we think, in the latter contention. We are unable to regard the written agreement between the parties, entered into in Buckingham county, whereby the selling price and the commissions were changed, otherwise than as a modification of the original agency contract; and the parties evidently so understood it. The prospective purchaser had been secured under the authority of the original, which in terms contemplated the possibility of a less price than that expressly named therein; and the only purpose of the supplemental agency agreement was to prevent the original from operating, as it would otherwise have done, to fix the commission at the rate of five per centum upon the amount of the purchase price. The supplemental contract was not necessary in order to authorize the sale at $27,000. That price and the conditions upon which it would be accepted were fixed by Dawson's offer and Fitzgerald's conditional acceptance. The primary contract of agency having been made in Lynchburg, we have no difficulty in holding that at least a part of the cause of action arose there.

The case, in the respect now under consideration, is within the reasoning adopted by this court in *Ferguson* v. *Grottoes Co.*, 92 Va. 316, 23 S. E. 761, the syllabus of which satisfactorily sets forth the essence of the decision as follows:

"*Common Law Action—Venue—Case at Bar.*—If a corporation, at its home office, employs an agent to sell its stock, and subsequently informs its agent by telegram, in answer to a telegram from him, that it has no more stock for sale, but that he can continue to sell stock in conjunction with another, who had an option on all the stock left, and divide commissions with him, and the agent does proceed

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to make sales, this is not a new contract, but a modification of the original agreement, and an action to recover commissions on stock sold before and after the said telegram must be brought within the jurisdiction of the home office, and cannot be maintained in the jurisdiction where the telegram was received by such agent."

The second assignment of error involves the propriety of the trial court's action in rejecting defendant's plea in abatement No. 2. This plea was identical with plea No. 1 as far as the latter went, but attempted to add thereto a second and wholly separate and distinct ground of defense, namely, that "at the time of the service of the writ in this action upon him, he, the said defendant, was in the city of Lynchburg solely for the purpose of defending another suit brought against him by the same plaintiff."

At the argument of the case in this court, counsel for defendant, while not actually abandoning this assignment of error, practically conceded that, under the authorities in this State, the plea was bad for duplicity.

Counsel for plaintiff, while insisting that the plea was plainly double and, therefore, fatally defective, further contend, with much show of reason and authority, that as a plea of privilege its allegations were not sufficiently clear and definite to show that the defendant was immune from service of process. We deem it unnecessary, however, to pass upon the latter contention. If the facts averred are no sufficient to set up a good defense upon the ground of privilege the plea was not double and was good as to the venue, but in that view there was no error in rejecting it, because the same defense was set up in plea No. 1. If, on the other hand, we assume that the averments in plea No. 2 were sufficient for a plea of privilege, its rejection was also clearly right. Judge Riely, with characteristic perspicuity, states the rule here applicable, in *Guarantee Co.* v. *Bank*, 95 Va. 480, 488, 28 S. E. 909, 912, as follows: "If either of the

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defenses set up in the plea were true, the verdict upon the issue must have been for the defendant. So that the plea presented two distinct and sufficient defenses, either of which, if true, would have necessitated a finding on the issue in favor of the Guarantee Company. The plea was therefore bad for duplicity."

The only remaining ground of error upon which, as we understand, serious reliance is placed, relates to the refusal of the trial court to give instruction "D," and giving in lieu thereof instruction 4.

Instruction "D," offered by the defendant and refused by the court, was as follows:

"The court instructs the jury that it is the duty of a real estate agent who undertakes to procure a purchaser of property placed with him for sale to act in the utmost good faith with his principal. It is his duty to place his principal in full possession of all the facts bearing upon his personal interest and relations to the subject and toward the prospective purchaser. Loyalty to his trust is the most important duty which the agent owes to his principal. The law will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides in the same transaction.

"All such transactions are voidable and may be repudiated by the principal without showing that he was injured.

"And if the jury believes from the evidence that the plaintiff in conducting the negotiations between the prospective purchaser and the defendant acted in reality as the agent of both parties or in his own interest as opposed to that of his principal, then they must find for the defendant, unless they further find from the evidence that the defendant, with full knowledge of all of the facts and relationships, ratified his acts."

Instruction 4, given as a substitute for instruction "D," was as follows: "The court instructs the jury that if they

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believe from the evidence that the plaintiff in conducting the negotiations between the prospective purchaser and the defendant acted in reality as the agent of both parties or in his own interest as opposed to that of his principal, then the defendant would not be bound by the contract, unless they further find from the evidence that the defendant, with knowledge of all the facts, signed the contract."

In view of the evidence in this case, we are unable to understand how any possible prejudice could have resulted to the defendant from the rejection of instruction "D," and the substitution therefor of instruction 4. We have not been shown, and we cannot find, anything in the evidence which to our minds indicates any breach of faith or double dealing upon the part of the plaintiff. It is true that Fitzgerald attempted to show, in defense of the action, that he was mentally incapable, from disease and drink, of entering into the contract with Dawson, but upon that question the evidence was conflicting, and the jury, upon clear and proper instructions, found against the defendant. In so far as the evidence tended to show that Fitzgerald was not capable of making a contract, and that the sale was improvident and unwise, it was offset by Beasley's positive testimony that he had no reason to suspect that Fitzgerald was mentally unsound or intoxicated, by the statement of Fitzgerald's daughter that a casual observer would not notice the fact when he was drinking, by his own statement that he desired and endeavored to conceal his drinking from both Beasley and Dawson, and by much other evidence, which the jury thought sufficient, to show that Fitzgerald was capable of making the contract.

Instruction "D" was correct as a statement of abstract legal propositions, and we are not prepared to say, and need not say, that the court would have erred in giving it. But instruction 4 was certainly a clear, correct and ade-

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quate statement of the law from the defendant's standpoint as applied to the facts of the case in hand, and there was no reversible error in the substitution.

The fourth and last assignment of error questions the refusal of the court to set aside the verdict. As stated in the defendant's petition for the writ of error, "the argument on this assignment is comprehended in the argument on assignments 1, 2 and 3."

We find no error in the judgment complained of, and it must be affirmed.

Affirmed.

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Richmond.

HARPER AND ANOTHER v. WALLERSTEIN.

January 24, 1918.

Absent, Burks, J.

1. SPECIFIC PERFORMANCE—*Contract of Sale—Sufficiency of Description of Land.*—The Chancery Court of the city of Richmond decreed specific performance of a written contract of sale between defendants and complainant, whereby defendants agreed to sell to complainant "that certain property situated in the city of Richmond, Virginia, 'No. 504 east Marshall street and all improvements thereon,' "—which the court ascertained fronted twenty-six feet on east Marshall street, and extended back at a right angle and between parallel lines 98.70 feet. From this decree defendants appealed. The sole question was, what property was embraced by the description. Defendants admitted the execution of the contract of sale, but claimed that they had in mind and only intended to sell the portion of the lot fronting on east Marshall street actually covered by the buildings. Complainant, on the other hand, examined the land books and records to identify the property designated as No. 504 east Marshall street, and these records and other testimony fully identified the property described in the contract of sale and fixed its dimensions as established by the decree under review.
   Held: That, there was no error in the decree.
2. VENDOR AND PURCHASER—*Deeds—Description of Property by Number.*—In a city having a known system of notation, regulated by municipal laws and acted upon by every one, the description of premises in a deed or contract of sale by a number is sufficiently definite.
3. DEEDS—*Vendor and Purchaser—Description of Land Conveyed—Parol Evidence.*—The object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do, without helping evidence—but to furnish the means of identification; when that is done it is sufficient. That is certain which can be made certain, and evidence *aliunde* is

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admisaible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree for complainant. Defendants appeal.

Affirmed.

The opinion states the case.

Jno. B. Gayle and *Daniel Grinnan,* for the appellants.

Arden Howell and *Samuel A. Anderson,* for the appellee.

WHITTLE, P., delivered the opinion of the court.

From a decree of the Chancery Court of the city of Richmond, granting to the appellee specific performance of a written contract of sale between appellants and appellee of "that certain property situated in the city of Richmond, Virginia, 'No. 504 east Marshall street and all improvements thereon,' "—which the court ascertained fronted twenty-six feet on east Marshall street, and extended back at a right angle and between parallel lines 98.70 feet—this appeal was granted.

The sale was negotiated by an employee of real estate brokers, agents for appellants, and the contract was prepared in their office. The sole question is, what property is embraced by the description, "* * * the following property, to-wit: No. 504 east Marshall street and all improvements thereon."

The entire property owned by appellants was "L"-shaped, one end of which fronted on east Marshall street, and the other end on north Fifth street. The former was improved with a store building sixty-six feet and three inches in length, the latter with a brick stable extending entirely

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across the lot from the north Fifth street front. There is a vacant space in rear of the store house, which runs back to a temporary wooden shed attached to the side of the stable toward its rear end.

Appellants admit the execution of the contract of sale, but say that they had in mind and only intended to sell the sixty-six feet and three inches of the lot fronting on east Marshall street actually covered by the buildings; but they did not disclose that fact to appellee. Appellee, on the other hand, examined the land books and records to identify the property designated No. 504 east Marshall street. On the land books he found it charged to appellants as No. 504, containing twenty-six feet by 98.70 feet. He, moreover, inspected a partition deed dated February 18, 1890, between T. H. Ellett and Mary Etta Brown, in which reference was made to a plat drawn by Bates and Bolton January 30, 1880, which papers and the deed from Ellett, trustee, and Mary Etta Brown and her husband to appellants also described lot 504 as having a depth of 98.70 feet. These records and the testimony of J. S. Clark, a civil engineer, fully and plainly identify the property described in the contract of sale and fix its dimensions as understood by appellee and established by the decree under review. Indeed, appellants themselves must so have regarded it, at least for purposes of taxation, since it was their duty to cause it to be correctly entered on the land books, where, as observed, the foregoing dimensions appear. Code, section 634. These, then, being the established facts, the controlling principles of law are not difficult of application.

The case of *Virginia Iron, etc., Co.* v. *Cranes Nest Co.*, 102 Va. 405, 410, 46 S. E. 393, holds, that "A conveyance of all the coal underlying the grantor's tract of land known as the 'Sandy Ridge tract,' adjoining the lands of certain named owners, though not a complete description, will convey the coal underlying the tract as it has been known for

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twenty years prior to the conveyance, although the grantor may have intended to except a portion of the tract, the coal under which he had previously contracted to sell to another, and although the description would have been equally accurate if the excepted land was not included. A grantor will not be allowed to change the effect of his conveyance by a statement that he did not intend to include this or that parcel of land therein when such intention was not made known to his grantee at the time and acquiesced in by him."

In *Trout* v. *N. & W. Ry. Co.*, 107 Va. 575, 583, 59 S. E. 394, 397, 17 L. R. A. (N. S.) 702, the court quotes with approval from *Melton* v. *Watkins*, 24 Ala. 433, 60 Am. Dec. 481, as follows: "It (the parol evidence) varied by parol the legal effect of the deed and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority, that all previous or contemporaneous parol agreements or understandings between the parties materially altering or varying by adding to or subtracting from the written agreement, must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties when it is clear and unambiguous."

In *Warren* v. *Syme*, 7 W. Va. 474, it is said: "Intrinsic certainty in a deed relative to specific property is simply impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it refers, or other objects or things that more or less directly and distinctly indicate and determine it. And in the application of deeds and other documents to lands and lots extension latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts, to which the description or suggestions in the deed may apply * * * The certainty of a deed is de-

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termined by the principles of the common law. The recordation is regulated by the statute alone."

In *Thorn* v. *Phares*, 35 W. Va. 772, 14 S. E. 399, it is held: "The main object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do, without helping evidence—but to furnish the means of identification, and when this is done it is sufficient. That is certain which can thus be made certain."

With respect to the sufficiency of the description of lot No. 504:

In *Flanigen* v. *City of Philadelphia*, 51 Pa. 491, syllabus, it is said: "In a city having a known system of notation, regulated by municipal laws and acted upon by every one, the description of premises in ejectment by a number is sufficiently definite." That the city of Richmond has such a system, see City Code, section 35, p. 312.

So, in *Tallman* v. *Franklin*, 14 N. Y. 584, 592, it is said: "Nor do I think there was such an uncertainty in the lots as to render the contract incapable of execution, and, therefore, void. They are described as building lots, on 132d and 133d streets, between the Fifth and Sixth avenues. The numbers of the lots are given."

So also, in *Engler* v. *Garrett*, 100 Md. 307, 397, 59 Atl. 648, 650, the court says: "Nor do we think there can be any objection to the contract on the ground of uncertainty. It describes the property as No. 2035 N. Fulton avenue, and further designates it as the property occupied by Samuel S. Linthicum. This certainly is quite as definite and certain as the description we held good in the case of *Kraft et al* v. *Egan*, 76 Md. 252, [25 Atl. 469], where it is said that a decree for specific performance will not be refused merely because the contract does not state in what county or State the lands agreed to be conveyed lie, provided the

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description of the premises is not thereby rendered altogether indefinite."

In *Scheible* v. *Slagle,* 89 Ind. 324, syllabus, it is said: "The office of a description in a deed is not to identify the land conveyed, but to furnish the means of identification; and, when there is a general designation of the property intended to be conveyed, parol evidence is competent to show what property the description covers." And in the opinion, at p. 330-1 of 89 Ind. it is said: "The rule prohibiting the contradiction of written instruments by oral evidence is not invaded by permitting testimony of the declarations of the grantor as to the character and condition of the property in cases where there is a mere general description of the real estate which the grantor assumes to convey. Where there is a general description of the property intended to be conveyed, it is competent to show by parol what property the description covers."

In *Pittsburg, C., C. & St. L. Ry. Co.* v. *Beck,* 152 Ind. 421, 53 N. E. 439, it is said: "Uncertainty in the description in a deed is immaterial, if the premises intended to be conveyed can be identified by means of the description, in connection with other conveyances, plats, lines, or records well known in the neighborhood, or on file in public offices."

The latest pronouncement of this court on the subject will be found in the case of *Asberry* v. *Mitchell,* 121 Va. 276 93 S. E. 638.

We think the cases relied on by appellants, of which *Grayson L. Co.* v. *Young,* 118 Va. 122, 86 S. E. 826, is a type, are distinguishable from the case in judgment. In that case it was sought by extrinsic evidence to supply *defects* and *omissions* in the *terms* of the *written contract,* not, as in this case, merely *to apply* the contract to its subject matter.

Upon the whole case, we are of opinion that the decree appealed from is without error and should be affirmed.

Affirmed.

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Syllabus.

Richmond.

HILL v. STARK AND OTHERS.

January 24, 1918.

1. ADVANCEMENT—*Definition.*—It is difficult to frame a definition of the term advancements with accuracy and precision, inasmuch as it is used in both a popular and a technical sense. It has been enlarged in many instances to meet the apparent justice of particular cases and restricted in other instances for the same reason; moreover the statutory enactments of various jurisdictions have to some extent changed its common law meaning. Notwithstanding the difficulty of framing a definition which will cover every case, there are certain well determined and essential elements that are usually accepted as being necessary to the existence of an advancement.
2. ADVANCEMENT — *Definition — Technical Sense.*—In its strictest technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate.
3. ADVANCEMENT—*Essential Elements.*—In general, two elements are essential to constitute an advancement, a gift by the parent to the child and the intention by the donor that the gift shall be an advancement. But the latter may be inferred from the former. Nevertheless, a gift, in contradistinction to a transfer for valuable consideration, is indispensable.
4. ADVANCEMENT—*What Constitutes—Case at Bar.*—A contract was entered into between a mother and her son. The contract provided that the mother employed her son as her agent and attorney in fact to manage and control her interest in a partnership between herself and another, according to his judgment and discretion without any interference on the part of the mother. As compensation for his services the son was to receive the profits of the business; and if his mother died during the continuance of the partnership, her interest therein, including her contribution to the capital stock, was to pass to and become the property of the son, and should not pass to her personal representative, but should the son die during the con-

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tinuance of the contract, then the mother was to have the original capital, but the profits were to go to the son's estate. The son also agreed to pay his mother the interest on the capital invested by her in the partnership during the continuance of the contract.

Held: That, in this agreement all the elements of an executory contract between the mother and son were present, and that the contribution by the mother of the capital towards the formation of the partnership was not a gift by the mother to her son, and that he could not be compelled to bring it into hotchpot before participating in his mother's estate. Moreover, from the agreed statement of facts it appeared that the mother did not consider the capital advanced to the partnership part of her estate, or an advancement to her son, so that both of the essential elements of an advancement were wanting.

Appeal from a decree of the Circuit Court of Culpeper county. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Edwin H. Gibson, for the appellant.

Grimsley & Miller, for the appellees.

WHITTLE, P., delivered the opinion of the court.

The case is this: Appellant, Adina Hill, a daughter of Kate N. Stark, deceased, filed her bill in equity against the administrator and the other heirs and distributees of her mother, who died intestate, for partition and distribution of her real and personal estate among those entitled. The sole controversy arises out of the prayer that the defendant, J. C. Stark, a brother of complainant, be denied participation in the distribution of the estate until he shall have brought into hotchpot the sum of $4,000, alleged to have been received by him as an advancement from the decedent in her lifetime.

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J. C. Stark, in his answer, controverts the allegation that the sum in dispute was an advancement, but avers that he was a purchaser for value of the fund by contract in writing.

From a decree sustaining the defendant's contention, this appeal was taken.

The contract referred to was entered into by Kate N. Stark and J. C. Stark on August 16, 1909, and in substance is as follows: The first party employed the second party as her agent and attorney in fact to manage and control her interest in a partnership between herself and T. H. Brown, as Brown & Stark, in the dry goods, boot and shoe business at Culpeper. The second party was to manage and control the interest of the first party in the business according to his judgment and discretion without interference on her part, and to act in all respects in connection with the business as if he was the partner instead of the first party, and his name was so to appear in the firm. As compensation for his services the second party was to receive the profits of the business; and if the first party died during the continuance of the partnership, her interest therein, including her contribution to the capital stock, was "at once to pass to and become the property of the party of the second part, and shall not pass to the personal representative of the party of the first part, but should the party of the second part die during the continuance of this contract, then the party of the first part to have the original capital, and the profits to go to the estate of the party of the second part.

"In consideration of the premise and undertakings on the part of the party of the first part, the party of the second part agrees to pay to the party of the first part, the interest on $4,000 during the continuance of this contract, such interest to be paid in equal monthly instalments."

The original contract stipulated that the partnership should last for three years; but afterwards it was agreed that it should continue until such time as should be mutually

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agreed on by the parties. Mrs. Kate N. Stark died in August, 1916, at which time the contract was in full force and effect; and up to the time of her death J. C. Stark had performed all obligations assumed by him.

In 1 R. C. L., at sec. 1, p. 653, it is said: "It is difficult to frame a definition of the term advancements with accuracy and precision, inasmuch as it is used in both a popular and a technical sense. It has been enlarged in many instances to meet the apparent justice of particular cases and restricted in other instances for the same reason; moreover the statutory enactments of various jurisdictions have to some extent changed its common law meaning. Notwithstanding the difficulty of framing a definition which will cover every case, there are certain well determined and essential elements that are usually accepted as being necessary to the existence of an advancement. In its strictest technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate." See also, the definition of advancement given in *Darne's Ex'r* v. *Lloyd*, 82 Va. 859, 5 S. E. 87, 3 Am. St. Rep. 123, and in notes to Code, sec. 2561.

In general, two elements are essential to constitute an advancement, a gift by the parent to the child and the intention by the donor that the gift shall be an advancement. But the latter may be inferred from the former. Nevertheless, a gift, in contradistinction to a transfer for valuable consideration, is indispensable.

Here, the agreement was for the mutual convenience of the parties. The son contributed his time and services in return for contemplated profits, the fruits of his labor, aided by the mother's capital, for the use of which he was to pay its earning value in interest at monthly intervals. But in

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the event of his surviving his mother during the continuance of the business, the capital was to be his property; but if she survived him, it was to remain her property, and the profits alone, if any, were to go to his estate. It may be that, in the former contingency, the stipulations of the contract were more favorable to the son; yet, in the latter, they were not more so than in any other case in which a person conducted a mercantile business on borrowed capital. It is not essential, however, for us, in construing this contract, to attempt to balance benefits. There is no suggestion of unfairness in the transaction, or that the parties were not competent to contract. Indeed, all the elements of a contract executory were present: "A *mutual agreement* between * * * *competent parties* for a *valuable consideration,* touching a lawful subject matter." 4 Minor's Inst., Pt. I, p. 16.

The learned author, at the same page, observes: The amount of the consideration, so it be appreciable, is immaterial, save only that, if grossly inadequate, it may tend to *prove a fraud.*"

Our conclusion on this branch if the case is, that the fact of a gift from the mother to the son is not established.

Moreover, it was agreed that on the trial of the cause the court should consider an agreed statement of facts as duly proven, with the right to object to any fact as competent evidence. The statement, in part, is as follows:

"* * * Fifth. That if T. H. Brown were called as a witness he would testify that at the time of signing the paper extending the terms of said contract, which paper was witnessed by him, he would say, at the time of the execution of such paper Kate N. Stark stated to him, at her death the said $4,000 invested in said business should constitute no part of her estate, and that nothing was said as to the distribution of her other estate, nor was anything said as to whether J. Clifford Stark was or was not to account for four thousand dollars invested in the firm of Brown & Stark in the distribution of her estate."

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This statement of Mrs. Stark is substantially a repetition of one of the stipulations of the contract, and shows that, in the event of her son surviving her, she did not consider the four thousand dollars part of her estate, or an advancement to him, which necessarily would result were it required to be brought into hotchpot. So that both of the essential constituents of an advancement are wanting.

For these reasons we are of opinion to affirm the decree.

Affirmed.

SIMS, J., dissenting:

I cannot concur in the conclusion of the majority opinion, "that the fact of a gift from the mother to the son is not established," or "that the statement of Mrs. Stark," referred to in the opinion, "shows that, in the event of her son surviving her, she did not consider the four thousand dollars * * * as an advancement to him."

The subject in controversy is not the estate in the $4,000 for the life of the mother, but the estate in remainder in such fund after the death of the mother, in the event of her son surviving her. The latter estate was the subject of the gift or purchase, as the case may be, and that only. I am unable to discover any consideration whatever, even the smallest, moving from the son, to sustain the claim of the latter that he was a purchaser for value of such estate in remainder.

Now as to the life estate aforesaid in said fund, I can see that the son was a purchaser for value in a certain sense. He agreed to pay and did pay to his mother the legal rate of interest on this fund during her lifetime, which the money would have earned by the loan of it to any one whomsoever. But he did not agree to pay, nor did he pay her anything more; nor was she to receive directly or indirectly anything more for the use of such money during his life, or for the estate in it in remainder after her death. The contract as it comes before us, subject to the stipulation that

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it should "continue until such time as may be mutually agreed upon by both parties hereto," was in effect a loan of the $4,000 from the mother to the son during her life, unless that contract should be changed by her with his consent. By mutual agreement between the mother and son the money was to be used in a certain way during the continuance of the loan, namely, it was to remain invested in the capital stock of the firm of Brown & Stark, but this was in no way whatsoever for the benefit of the mother. She was not to receive one cent of the profits such capital might earn in the business of said firm during the continuance of such loan to the son. Such use of the money was to be for the sole benefit of the son, even to the extent that not only should he receive all such profit during his life, but in case of his death during the continuance of such loan, such profit up to the time of his death should pass to his personal representative and not to his mother or her personal representative. It is true the son was to give his personal services and attention to the business of said firm; his name was to appear as a partner therein in lieu of his mother's name; but this, too, was in no way for her benefit, being solely for the benefit of the son; the effect being to set him up and start him in business in life in a responsible position and in one which promised to be of advantage to him from a business standpoint, and which indeed proved to be so. He was not to act as the agent of the mother in this relationship of partner in the said firm; he was to act "according to his (own) judgment and discretion, without interference by the party of the first part (the mother) and to act in all respects in connection with said business as if he were the partner instead of the party of the first part." It is true that the son acted in this matter under a power of attorney created by the contract, but it was a power coupled with an interest—indeed with the whole interest to be derived from his action thereunder—and a power irrevocable, save by his consent, during the life of the mother.

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Such was the nature and effect of the contract with respect to the estate in the fund during the joint lives of the mother and son. It reserved a life estate in the mother in the fund to the extent of the legal rate of interest thereon; and, further, it vested in the son the absolute estate in remainder in said fund after the death of the mother in the event that the son survived her. As to such estate in remainder, it seems to me clear that it was a gift, pure and simple, from the mother to the son, without an iota of consideration, whether of benefit to the mother or of change of the *status quo ante* of the son to his injury, moving from the son to support it. Its origin was in her bounty; it came from her estate; it was practically the son's aliquot part of her whole estate, and its object was to continue him in business as a member of said firm which her loan to him aforesaid had so happily begun; and it had no consideration to support it save only the love and affection of the mother for the son. And the form of the gift was wise and appropriate in view of the prior habits and lack of success in business of the son.

As to whether the gift was "by way of advancement," under section 2561, Code of Virginia:

As stated in the majority opinion: "In general, two elements are essential to establish an advancement, a gift by the parent to the child and the intention by the donor that the gift should be an advancement. But the latter may be inferred from the former." This is true, because, as stated in 1 R. C. L., p. 655, sec. 3, "The doctrine (of advancements) rests on the supposed desire of an ancestor to equalize his estate among his heirs, not only as to the property left at the time of his death, but as to all property that came from him, so that one child shall not be preferred to another child in the final settlement of his estate. It has for its object the furtherance of that maxim of equity which declares that equality is equity." And as further stated, *Idem*, p. 668, sec. 21:

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"And the circumstances surrounding the transaction, or in truth the mere gift by a parent to a child, may be such as to create a presumption of an advancement. For the doctrine that a parent desires to distribute his estate equally among all his children is so strong that it will be presumed that a parent who during his lifetime makes a substantial gift to a child intended such gift to be an advancement; and hence it is often stated that a gift to a child or to an heir by an ancestor in his lifetime is *prima facie* an advancement." To the same effect are the Virginia decisions. *Watkins* v. *Young*, 31 Gratt. (72 Va.) 84; *Gregory* v. *Winston*, 23 Gratt. (64 Va.) 102; *McDearman* v. *Hodnett*, 83 Va. 281, 2 S. E. 643; *Bruce* v. *Slemp*, 82 Va. 352, 4 S. E. 692; *Carter* v. *Cutting*, 5 Munf. (19 Va.) 223.

It is said by some of the authorities on this subject that the gift must be complete and must be irrevocable in the lifetime of the donor in order to constitute an advancement. Thornton on Gifts and Advancements, sec. 510, 527, 530; *Darne's Ex'r* v. *Lloyd*, 82 Va. 861, 5 S. E. 87, 3 Am. St. Rep. 123; *Brook* v. *Latimer*, 44 Kan. 431, 24 Pac. 946, 11 L. R. A. 805, 21 Am. St. Rep. 292. But this has reference to the *title* to the subject of the gift, and not to the time of the entrance into the possession and enjoyment of the subject of the gift. 1 R. C. L., sec. 10, pp. 660, 661. An estate which is secured to a child to commence *in futuro*, after the donor's death, and upon a contingency that * * * will arise within a reasonable time, may be an advancement." 1 R. C. L., sec. 8, p. 659. Now in the cause before us the title to the subject of the gift in remainder after the life estate of the donor, subject to the contingency that the donee survived the donor, was vested in the son as donee in the lifetime of the donor irrevocably by the contract aforesaid so far as the donor was concerned—the gift could not be revoked without the consent of the son, the donee. It was an estate which was vested in him by the contract. It was an estate

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which he could have alienated, which is one of the most characteristic incidents of an advancement. 1 R. C. L., sec. 10, p. 661.

Coming now to the consideration of the only evidence in the case referred to in the majority opinion as bearing on the actual intention of the donor with respect to the gift being or not being an advancement, I do not think the statement of Mrs. Stark has the meaning attributed to it in the majority opinion. That statement itself went no further than to say that "at her death the $4,000 invested in said business should constitute no part of her estate." This statement, as the majority opinion correctly states, is substantially but a repetition of one of the stipulations of the contract, "and shows that * * * she did not consider the four thousand dollars part of her estate." And in fact it was not a part of her estate, if it was an advancement. As stated in 1 R. C. L., sec. 34, p. 677: "Furthermore, it should be noted that an advancement is no part of an estate * * *." A donee need not bring his advancement into hotchpot. His title to it is complete upon the happening of the event upon which his right to enter into possession of it was conditioned, if the gift be so conditioned upon any event, and it is not a part of the estate of the donor. And this is still true, although the donee may bring his gift into hotchpot. As said by the same learned editors of 1 R. C. L. (sec. 25, p. 671): "And a donee, by bringing his advancement into hotchpot, does not thereby relinquish his title to the advancement, the purpose of bringing it in being merely to ascertain whether it exceeds or falls short of his equal share."

Hence, in the case before us, nothing appears to rebut the *prima facie* presumption arising from the gift itself from a mother to a son that it was intended as an advancement. And, indeed, all the attendant incidents of the gift, its mani-

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fest object and all the surrounding circumstances furnish convincing affirmative evidence that it was intended as an advancement.

For the foregoing reasons I am constrained to the opinion that there was error in the decree complained of, and that the cause should be reversed.

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Richmond.

KIRBY v. BOOKER, GUARDIAN, ETC.

January 24, 1918.

1. EXECUTORS AND ADMINISTRATORS—*Debts of Decedent—Sale of Realty to Pay Debts.*—The personal estate of an intestate is the primary fund for the payment of his debts, and until the amount thereof has been ascertained it cannot be told to what extent it will be necessary to resort to the real estate. The lands of a decedent ought not to be sold for the payment of his debts until the court has first ascertained the debts of the decedent and their relative priorities, if any, and the amount of his personal estate applicable thereto. The object of the rule is that the land shall be sold under such conditions as will realize the best price therefor. The rule is well settled that it is error to decree a sale of land for the payment of the liens thereon until there has first been an account of such liens and their relative priorities, if any, and the reason of the rule is equally applicable to the sale of the lands of a decedent for the payment of his debts.

2. EXECUTORS AND ADMINISTRATORS—*Debts of Decedent—Sale of Realty to Pay Debts—Case at Bar.*—A decree was entered for the sale of the real estate of a decedent in a creditor's suit to subject the real and personal estate of the decedent to the payment of his debts. The suit was instituted by an attorney at law, suing on behalf of himself and all other creditors of the decedent, to enforce the collection of a claim for attorney's fees. The only heir of the decedent was a daughter five years of age. The suit was referred to a commissioner to take an account of the real estate and personal estate of the decedent, and an account of the debts, liens and demands against the estate of the decedent. The report of the commissioner did not furnish definite information as to either the assets or liabilities of the decedent and therefore the record was in no condition to enable the court below to enter a decree for sale.

3. EXECUTORS AND ADMINISTRATORS—*Debts of Decedent—Sale of Realty to Pay Debts—Case at Bar—Adequate Price.*—It was insisted in the instant case that the sale was a fair one, the price adequate and that the sale should not be set aside for the slight incompleteness of the commissioner's report; and also

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that the debts were far in excess of the value of the land and in no event could the heir be benefited, and that no creditor was complaining. However, one of the exceptions to the report of the sale was "an utterly inadequate price" obtained for the property, upon which the lower court refused to pass. Under these circumstances the Supreme Court of Appeals cannot tell whether the land sold for a fair price or not. The only heir of the decedent is an infant of very tender years and cannot put in an upset bid for the land, no account of the personal estate of the decedent has been taken, and no accurate report has been made of debts due by the defendant, and of the liens on his real estate. For these reasons, the decree of the circuit court setting aside the sale was affirmed.

Appeal by a purchaser of land at a judicial sale from a decree of the Circuit Court of Halifax county, setting aside the sale.

Affirmed.

The opinion states the case.

Easley & Bouldin, for the appellant.

John Martin, for the appellee.

BURKS, J., delivered the opinion of the court.

This is an appeal by a purchaser of land at a judicial sale from a decree setting aside the sale. Several exceptions were filed to the report of sale, but the circuit court passed on only one of them, and, as we think, it properly set aside the sale, it will be unnecessary to notice the other exceptions. The exception sustained in the trial court was because "there was no complete account of liens against the lands sold, and it was error to decree a sale of said lands without such account."

The suit in which the decree was entered was a creditor's suit to subject the real and personal estate of a decedent

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to the payment of his debts. It was instituted by R. I. Overby, an attorney at law, suing on behalf of himself and all other creditors of C. G. Kirby, the day after the decedent's death, to enforce the collection of a claim for attorney's fees. The only heir of the decedent was a daughter five years of age, who, together with the sheriff of the county to whom the estate seems to have been very promptly committed, was made a party defendant to the bill. As soon as the suit was matured for hearing, it was referred to a commissioner to take the following accounts:

"1st. An account of the real estate and personal estate owned by the said decedent, C. G. Kirby, at the time of his death.

"2nd. An account of the debts, liens and demands against the estate of the said decedent."

In response to this order of reference, the commissioner returned a report in which he set out specifically the various parcels of real estate owned by the decedent and the character of his estate therein. As to the personal estate he says:

"I herewith file a report of the administrator, L. W. Rice, sheriff of Halifax county, and as such administrator of the decedent, which shows that the value of the personalty belonging to the estate of said decedent is $306.75.

"It is evident that the personal property is insufficient to satisfy the debts proved against the estate of the decedent."

But no such report is filed, and no account of the administration is taken. There is copied into the record an "appraisement of personal property of C. G. Kirby, deceased, "showing that the tangible personal property of the decedent was appraised at $306.75, just the amount stated by the commissioner, but this appraisement takes no notice of intangible property. Just how much of this there was we have no means of knowing, but the bill refers to a note

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of S. A. Kirby for $183.00, which was secured by deed of trust and had been assigned to the decedent, and prays that the trustee "be allowed and directed to execute said deed of trust." It is certain that the report of the commissioner did not accurately inform the court of the amount or value of decedent's personal estate.

In the report of debts of the decedent, under the head of specific liens, the commissioner makes this statement: "On remainder in tract of 222 acres. It is recited in deed from Susan A. Kirby to C. G. Kirby, that this land is subject to the payment of a debt of $350.00 due by Susan A. Kirby to Jno. W. Fitzgerald and a debt of $40.00 to J. T. Cole. The above charges, while not debts of the decedent, are probably charges on the land."

There should have been no uncertainty whatever about these charges. It was the duty of the commissioner to ascertain whether or not these debts had been paid, and to have informed the court on that subject. If they were not paid he should have ascertained the date from which they bore interest, so that the court and all parties might know the extent of the liability of the estate of the decedent. The report of the commissioner did not furnish definite information as to either the assets or liabilities of the decedent and the record was in no condition to enable the court to enter a decree for sale.

No exception was filed to the report of the commissioner on that account, but attention is called to the fact that while the commissioner says that he returns with his report "certain accounts and bonds filed with him by creditors of the decedent, whose debts he has reported," no such accounts and bonds appear in the record. The complainant in his bill says, "that said decedent's estate is indebted to your complainant in the sum of $150.00, evidenced by an open account," but no such account is to be found anywhere in the record, nor is there any proof of the value of the serv-

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ices rendered. H. E. Kirby, a non-professional witness and a brother of the deceased, testifies that certain professional services were rendered the deceased by the complainant, but he makes no effort to fix a value thereon, even if he were competent to do so. The same witness testifies that the decedent owed Susan A. Kirby rent for five years at $150.00 per year, by contract. But no such contract appears in the record, and whether it was verbal or written we have no means of knowing. If it was verbal, probably a large part of it was barred by the act of limitations which it was the duty of the administrator to plead. Every dollar of these debts may be justly due and owing, but the record does not show it with that clearness and certainty which should be made to appear before a decree for a sale is entered. This is due as well to the creditors themselves as to the decedent's estate.

The personal estate of an intestate is the primary fund for the payment of his debts, and until the amount thereof has been ascertained it cannot be told to what extent it will be necessary to resort to the real estate. The lands of a decedent ought not to be sold for the payment of his debts until the court has first ascertained the debts of the decedent and their relative priorities, if any, and the amount of his personal estate applicable thereto. The object of the rule is that the land shall be sold under such conditions as will realize the best price therefor. The rule is well settled that it is error to decree a sale of land for the payment of the liens thereon until there has first been an account of such liens and their relative priorities, if any, and the reason of the rule is equally applicable to the sale of the lands of a decedent for the payment of his debts. *Coles* v. *McRae*, 6 Rand. (27 Va.) 644; *Horton* v. *Bond*, 28 Gratt. (69 Va.) 815; *Shultz* v. *Hansbrough*, 33 Gratt. (74 Va.) 567; *Fidelity Loan Co.* v. *Dennis*, 93 Va. 504, 25 S. E. 546; *Bristol Iron Co.* v. *Caldwell*, 95 Va. 47, 27 S. E. 838; *Bank*

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v. *Trigg Co.*, 106 Va. 327, 56 S. E. 158. As said in the last mentioned case, "the principle on which these decisions are founded is 'that a sale without first removing a cloud from the title and adjusting and settling rights in dispute, and without previously ascertaining and determining the liens and encumbrances, the amounts and priorities, tends to a sacrifice of the property as to creditors by discouraging them from bidding when they probably would have bid for the protection of their own interests if the rights of all parties had been previously ascertained and fixed with reasonable certainty.' It is first to be observed that the rule applies only to the sale of real estate; it has no application to the sale of personal property."

In the instant case there are both liens and unsecured debts and the rule applies with full force.

It has been earnestly insisted before us that the sale was a fair one, the price adequate and that the sale should not be set aside for the slight incompleteness of the commissioner's report. It is also said that the debts are far in excess of the value of the land and in no event could the heir be benefited, and that no creditor is complaining. It is sought to bring this case within the principle of *Utterbach* v. *Mehlenger*, 86 Va. 62, 9 S. E. 479. In that case the land sold for a *"high price"* and did not bring enough to pay more than one-half of the liens proved, and the court says, "there is nothing in the proceedings which could by any possibility be prejudicial to the rights of the appellants." This cannot be said of the instant case. One of the exceptions to the report of sale was "an utterly inadequate price" obtained for the property. Affidavits were filed by the purchaser to show the adequacy of the price paid, but this exception was not passed upon by the trial court. On this subject, the decree appealed from states, "there being a misunderstanding of counsel as to the time for considering the question of adequacy of price of the lands sold, the

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court refuses to pass upon this ground of exception to the report of the special commissioner at this time." Under these circumstances we cannot tell whether the land sold for a fair price or not. The only heir of the decedent is an infant of very tender years and cannot put in an upset bid for the land, no account of the personal estate of the decedent has been taken, and no accurate report has been made of debts due by the decedent, and of the liens on his real estate. For these reasons, the decree of the circuit court is affirmed.

Affirmed.

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Richmond.

EX-PARTE MALLORY.

January 24, 1918.

1. STATUTES—*Repeal by Implication—Commitment of Minors—Children's Home.*—Chapter 289, Acts 1910, page 434, in regard to the commitment of minors, is repealed by implication by chapter 350, Acts 1914, page, 696.
2. INFANTS—*Custody of Children—Acts 1914, Chapter 350.*—An order of the Juvenile and Domestic Court of the city of Richmond committed certain children to the Children's Home Society of Virginia. The children were not charged with any criminal offense when the order was entered, but only with being dependent and neglected children. They were taken from the home of the petitioner, their father in *habeas corpus* proceedings, during his temporary absence, and the charge was inquired into and the order entered without any notice whatever to the father of the proceedings, or other procedure required by the statute in order to dispense with such notice.

   Held: That, because of the lack of such notice and in the absence of the other procedure required by the statute, the court below had no jurisdiction to hear and determine the case, and hence the said order was void as against the petitioner and his legal right to the custody of his children.
3. INFANTS—*Commitment under the Act of 1914, page 696—Habeas Corpus—Appeal.*—If substantially the proceedings prescribed by chapter 350, Acts 1914, page 696, had been followed in the instant case, and if notice thereof had been given to the petitioner, the father of the children, the lower court would have had jurisdiction to proceed with the case and to have entered the order committing the children to the custody of the Children's Home Society of Virginia, and although there might have been error therein, such error could not have been inquired into or reviewed by the Supreme Court of Appeals in a proceeding by application for a writ of *habeas corpus*, but only by appeal from such order.

Petition for a writ of *habeas corpus*.

Awarded.

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The opinion states the case.

P. A. L. Smith and *R. W. Ivey,* for the petitioner.

S. S. P. Patteson, for the respondent.

PER CURIAM:

The Children's Home Society of Virginia relies upon an order of the Juvenile and Domestic Court of the city of Richmond, committing the custody and control of the children named in the petition, to legalize such custody. The children were not charged with any criminal offense when such order was entered, but only with being dependent and neglected children, as appears from said order. The proceeding was in fact instituted by a warrant issued by a justice of the peace, upon complaint and information on oath before him made by one H. F. Sweet that the children aforesaid were "exposed to vicious and immoral influences and all minors under the age of 18 years," and seems to have been issued under the supposed authority of chapter 289, Acts 1910, p. 434. That act, however, was repealed by implication by chapter 350, Acts 1914, p. 696. The procedure provided by the latter statute for such commitment of such children, not charged with any criminal offense, is as follows, namely: that upon the filing of a petition by any probation officer or other respectable person, "a summons shall issue requiring the person having custody or control of the child, or with whom the child may be, to appear immediately with the child at a place stated in the summons. The parent or guardian, or if there be neither, then a relative of such child, if the residence of such relative be known, shall be notified of the proceedings, and in any case the judge may appoint some suitable person to act in behalf of the child. * * * In case the summons cannot be served, or the party served fails to obey the same,

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or in any case, when it is made to appear to the court that such summons will be ineffectual, a warrant may issue on the order of the court, judge or justice, either against the parent or guardian, or the person having custody of the child, or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and determine the case in a summary manner." Section 8. If substantially such proceedings had been had in the instant case, and if notice thereof had been given to the petitioner, the father of said children, the said court would have had jurisdiction to proceed with the case and to have entered said order, and although there may have been error therein, such error could not have been inquired into or reviewed by us in a proceeding before us by application for a writ of *habeas corpus*, but only by "appeal" from such order. But the record before us shows that the children were taken from the home of the petitioner, their father, during his temporary absence; that the charge aforesaid was inquired into by the court and the order aforesaid was entered without any notice whatever to the father of the proceedings, or other procedure required by the statute in order to dispense with such notice.

We are, therefore, of opinion that because of the lack of such notice and in the absence of the other procedure required by the statute, the court below had no jurisdiction to hear and determine the case, and hence that the said order was void as against the petitioner and his legal right to the custody of his children.

No issue is made, nor was any evidence introduced by the Society to the effect that the facts are such that from the standpoint of the welfare of the children the legal right of the father to the custody of the children is superseded. The said Society rests its claim to the custody of the children solely on the validity of said order.

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We are, therefore, of opinion to grant the prayer of the petition, and an order of this court will be accordingly entered to have the same force and effect as if a formal writ were issued.

Awarded.

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Richmond.

NORFOLK SOUTHERN RAILROAD COMPANY v. SMITH.

January 24, 1918.

1. PLEADING—*Declaration—Sufficiency.*—Under the Virginia statute, Code 1904, section 3272, a declaration is not demurrable unless something so essential to the action is omitted that judgment according to the law and the very right of the case cannot be given. In the case at bar, an action for damages for personal injuries sustained at a railroad crossing, the four counts in the declaration gave the date and place of the accident, and such particulars thereof as plainly informed the company of every fact relied on by the plaintiff, which was essential to enable it to make its defense. The company was charged with negligence in several particulars, and with failure to exercise ordinary care to avoid the accident after, by the exercise of such care, it should have seen the plaintiff's danger. This was sufficient, and the court below properly overruled the demurrer.
2. CONTRIBUTORY NEGLIGENCE—*Presumptions and Burden of Proof.*—In an action for personal injuries sustained at a grade crossing, the court instructed the jury that the burden of proving contributory negligence was upon the defendant. This was erroneous, as the instruction should have concluded, "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances," or with language of similar import.
3. NEGLIGENCE—*Contributory Negligence—Last Clear Chance.*—The underlying principle of the doctrine of the "last clear chance" is, that notwithstanding the contributory negligence of the plaintiff, there is something in his condition or situation at the time of the injury to admonish the defendant that he is not able to protect himself. The doctrine is one of prior and subsequent negligence, or of remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. Where the negligence of both continues down to the moment of the accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery.

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Statement.

4. NEGLIGENCE—*Contributory Negligence—Last Clear Chance—Instructions.*—In an action for personal injuries sustained at a grade crossing, where plaintiff drove his automobile upon the track from fifty to seventy-five feet in front of an approaching train, the refusal to give, at the request of the defendant, the following instruction, was error: "The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident."

5. CROSSINGS—*Last Clear Chance.*—In an action for personal injuries sustained in an accident at a crossing, it appeared that the plaintiff drove his automobile upon the track of defendant about fifty or seventy-five feet before an approaching train and that plaintiff might have seen one hundred yards or more along the track after he passed a store which, until he was within twenty or more feet of the track, obstructed his view. Plaintiff testified that he never saw the train that struck him. The automobile could have easily been stopped at the speed at which it was going within seven or eight feet. It was demonstrated that the train could not have been moving rapidly at the time of the accident.

Held: That, under such circumstances as these, the doctrine of the last clear chance can have no application whatever. The proximate cause of the accident was the negligence of the plaintiff in failing to observe the approaching train, in failing to stop his car before reaching the railroad track, and in stopping it thereon almost immediately before the accident.

Error to a judgment of the Circuit Court of Princess Anne county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

James G. Martin, for the plaintiff in error.

R. R. Hicks and *W. R. L. Taylor,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The plaintiff in error, hereinafter called the company, complains of a final judgment in favor of the defendant in error, hereinafter called the plaintiff, because of an injury caused by the collision of a train of the company, consisting of three electrically operated cars, with an automobile operated by him, at a road crossing in Princess Anne county. There were two trials, the court having, upon motion of the company, set aside the first verdict in favor of the plaintiff, but refused to set aside the verdict against the company upon the second trial, and entered judgment thereon.

The first error assigned is the overruling of the demurrer to the declaration and to each count thereof. It is sufficient to say, as to this, that under the Virginia statute, Code, section 3272, a declaration is not demurrable unless something so essential to the action is omitted that judgment according to the law and the very right of the case cannot be given. In this case, each of the four counts in the declaration gives the date and place of the accident, and such particulars thereof as plainly informed the company of every fact relied on by the plaintiff, which was essential to enable it to make its defense. The company is charged with negligence in several particulars, and with failure to exercise ordinary care to avoid the accident after, by the exercise of such care, it should have seen the plaintiff's danger. This is sufficient, and the court properly overruled the demurrer.

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Another error assigned is the granting, upon the motion of the plaintiff, of instructions "A" and "B."

Instruction "A" reads thus: "The court instructs the jury that even though they may believe from the evidence that the plaintiff was guilty of contributory negligence, yet if they further believe from the evidence that the defendant company knew of the plaintiff's danger or by the exercise of ordinary care should have known of the plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so and if they believe from the evidence that the said defendant company failed to exercise this duty and that such failure was the proximate cause of the injury, it is liable and your verdict should be for the plaintiff."

An instruction in this precise language was condemned in the opinion of this court in *Norfolk Southern Railroad Co.* v. *Whitehead*, 121 Va. 139, 92 S. E. 916. In that case it was determined to be harmless error.

Instruction "B" reads thus: "The court instructs the jury that the burden of proving contributory negligence is upon the defendant."

Such an instruction has been condemned in several cases in Virginia, it should have concluded thus: "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances," or with language of similar import. *Kimball & Fink* v. *Friend*, 95 Va. 125, 27 S. E. 901; *Southern Ry. Co.* v. *Bruce*, 97 Va. 92, 33 S. E. 548; *Southern Ry. Co.* v. *Mason*, 119 Va. 262, 89 S. E. 225.

The refusal of the court to grant instruction "Z," at the request of the company, is assigned as error. This instruction reads: "The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the

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plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident."

This instruction should have been given in this case. It was peculiarly appropriate in view of the evidence to be hereinafter referred to, and the failure to give it was prejudicial error.

The doctrine of the last clear chance has nowhere been better stated than in the syllabus to the case of *Roanoke Ry. & Elec. Co.* v. *Carroll*, 112 Va. 598, 72 S. E. 125, thus: "The underlying principle of the doctrine of the 'last clear chance,' as declared by the decisions of this court, is, that notwithstanding the contributory negligence of the plaintiff, there is something in his condition or situation at the time of the injury to admonish the defendant that he is not able to protect himself. The doctrine is one of prior and subsequent negligence, or of remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. Where the negligence of both continues down to the moment of the accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery."

And again, in *Real Estate Trust & Ins. Co., Inc.* v. *Gwyn's Adm'x*, 113 Va. 337, 74 S. E. 208: "In order that the doctrine of the 'last clear chance' may apply, it must appear that, in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which

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he had a clear chance to do to avoid the accident. But the doctrine can have no application to a case where the negligence of both plaintiff and defendant is simultaneous and concurrent."

And in *Norfolk Southern R. Co.* v. *White's Adm'x,* 117 Va. 342, 84 S. E. 646, it is said: "The doctrine has no application where * * * the negligence of the plaintiff's intestate and that of the defendant, if there was any such, were so closely connected in point of time as not to have afforded the employees of the defendant a plain opportunity to avoid inflicting the injury for which the action is brought."

The instruction complained of, in its statement of the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, is based upon an expression in the opinion of Keith, P., in the last-named case; and in cases like this where the evidence justifies calling the attention of the jury to this truth, it is proper to give an instruction to the effect that there must be an appreciable interval of time between the moment in which the person charged with negligence should, in the exercise of proper care, have seen and apprehended the impending danger, and thereafter, in the exercise of such care, have sufficient time in which to take such action as will avoid the accident. Under the facts of this case, the instruction was manifestly proper. *Southern Ry. Co.* v. *Mason, supra; Wash. & Old Dom. Ry.* v. *Ward,* 119 Va. 334, 89 S. E. 140.

After verdict the company moved the court to set it aside as contrary to the law and the evidence, and this motion should have been sustained.

These facts appear from the evidence of the plaintiff and his witnesses: That he might have seen one hundred yards or more along the track after he passed the store which,

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until he was within twenty or more feet of the track, obstructed his view. His description of the accident is this: "As I was coming up from Norfolk way, going down to the Beach, coming looking, and I didn't hear no whistle blown, and didn't see no car, and when I got to the railroad, Mr. Gimbert's store blocks it so you can't see nothing until right on the railroad, and when I got to the railroad there were three negroes on the track, and I run up there and had to stop my machine, and blew my horn before I got there, and when I blew my horn two of the negroes got out of the way, and the other one stood there, and I don't remember anything else." He further says that he did not know what struck him until the next day. The plaintiff's wife, sitting next to him in the automobile, says that when the automobile was about three feet from the track she looked up and saw the car coming about seventy-five feet away, and there was a rise about two feet up on the track which cut their speed off, and when they got on the track they stopped right on it; that the train was coming just as fast as it could, that it didn't have any check at all, and she judged it was sixty or seventy-five feet away; that she was struck dumb she supposed; and that she did not have power to move or say anything. Charles Wood, another witness for the plaintiff, riding on the back seat of the automobile, says he saw the train just before he got to the track, but didn't say anything, and that to the best of his knowledge the train was about fifty feet off; that the train was very close. The plaintiff also says that after he looked each way and got near to the track he saw the men there when too late, even if he had seen the train. He says he didn't see the train. This statement of his that he did not see the train can only be explained by the fact that he did not look, because there was nothing to obstruct his vision after he passed Gimbert's store, which no one locates closer to the track than twenty

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feet, and which the evidence fairly shows was twenty-eight feet eight inches from the nearest rail of the railroad track, while the automobile could have been easily stopped at the speed at which it was going within seven or eight feet. The plaintiff repeats his statement that he never did see the train, and did not know what struck him until the next day. The train was stopped at the station about fifty feet away from the point of the collision, and it clearly appears that its speed had been slackened in order to stop at the station. Land, another witness for the plaintiff, says that if the automobile, instead of stopping, had continued to move, it might have gotten across, though "it would have been a close shave, but he might have made it." The witness chiefly relied upon to sustain the recovery is Trunnell, who had been a motorman on the Norfolk Southern. He says the train was going very slowly, and that he judged it could have been stopped in about twenty or thirty feet. He also says that even after the emergency brake had been put on, the train might slide one or two car lengths and sometimes more. On the first trial this witness had testified that the train could have been stopped in from twenty-eight to thirty feet.

The physical facts are, that although there were five occupants of the automobile, two of whom were children eleven and seven years of age, respectively, only the plaintiff, who was driving, was hurt; that after it was struck its engine continued to run, and described a semicircle, and after the collision was making its way back towards the train when Mrs. Smith, the plaintiff's wife, stopped the engine. These facts demonstrate that the train could not have been moving rapidly at the time of the impact. Under such circumstances as these, the doctrine of the last clear chance can have no application whatever. The proximate cause of the accident was the negligence of the plaintiff in failing to observe the approaching train, in fail-

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ing to stop his car before reaching the railroad track, and in stopping it thereon almost immediately before the accident.

The verdict will be set aside, the judgment reversed, and the case remanded for a new trial, if the plaintiff shall be so advised.

Reversed.

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Syllabus.

Richmond.

G. OBER & SONS COMPANY, INC. v. WM. G. SMITH, INC.

January 24, 1918.

1. APPEAL AND ERROR—*Commissioner's Report—Exceptions.*—Where on the face of the report of a commissioner no error is apparent, and no exception thereto was taken by appellant in the court below, it is too late to raise the objection on appeal. The evidence in the cause cannot be looked to by the appellate court to ascertain whether the commissioner's conclusions were sustained or not sustained by the evidence. The conclusion of the commissioner and the adjudication of the court below based thereon are final and conclusive upon the appellant and are not open to review in the appellate court.
2. PRINCIPAL AND AGENT—*Commissions.*—A contract of agency provided that the compensation of the agent of a manufacturer of fertilizer should be $2.00 per ton on all sales of fertilizer by him, with additional compensation of a bonus of $500.00 when the agent should sell, collect and settle with the manufacturer for as much as 1,000 tons of the fertilizer. The agent was to endorse notes of farmers taken for all sales of fertilizer on time. The manufacturer became entitled to the custody and control of the notes under the provisions of the contract, because the agent, without the consent of the manufacturer, ceased to pay any attention to the business of the agency and accepted other employment in another State.

   Held: That, the withdrawal of the notes by the manufacturer and the undertaking of the collection of them by him to the exclusion of the agent, was not a breach of the contract on the part of the manufacturer.
3. PRINCIPAL AND AGENT—*Commissions.*—A contract of agency provided that the compensation of the agent of a manufacturer of fertilizer should be $2.00 per ton on all sales of fertilizer by him, with an additional compensation of a bonus of $500.00 when the agent should sell, collect and settle with the manufacturer for as much as 1,000 tons of the fertilizer. The agent sold more than 1,000 tons of fertilizer but did not collect for 1,000 tons. Further, the agent breached his contract

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with the manufacturer by accepting employment in another State and giving no further attention to the business of the agency or the collections.

Held: That, this breach of contract by the agent abrogated the promise in respect to the bonus.

Appeal from a decree of the Circuit Court of Northampton county. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Jno. T. Daniel, Jas. E. Heath and *J. Warren Topping,* for the appellant.

Otho F. Mears, for the appellee.

SIMS, J., delivered the opinion of the court.

The decree complained of by appellant and upon which cross-errors are assigned by appellee was based upon three master commissioners' reports, made by the same commissioner on successive recommittals to him of the cause and his reports as first made, to none of which report was any exception taken by the appellant. To the commissioner's reports first filed the appellee took exceptions, raising the questions arising upon said cross-assignments of error.

This condition of the record renders it unnecessary for us to state in detail the facts of the case bearing on the appellant's assignment of error. And in the view we take of it, the following outline of the facts and statement of the questions raised on appeal by appellants and by the appellees will be sufficient.

The appellant is a manufacturer of fertilizer and the appellee (as it must be taken to be upon the issues made in the cause before us) was appellant's agent for its sale. The

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contract of agency provided that the compensation of appellee should be $2.00 per ton on all sales of fertilizer by him, the proceeds of sale of which should be collected by appellee or appellant and received by appellant, and an additional compensation of a "bonus" of $500.00 if and when the appellee should sell, collect and settle with appellant for as much as 1,000 tons of the fertilizer.

The appellee, in accordance with the contract, was to endorse farmers' notes taken for all sales of fertilizer on time, thereby making itself liable thereon to appellant as surety for the payment of such notes. Accordingly, appellee endorsed all of such notes, so taken, aggregating quite a large amount; the particular notes on which appellee was relieved from liability by the decree complained of aggregated, however, only $2,190.85; and under such contract appellee gave a bond to appellants, with Wm G. Smith and Mrs. Nannie V. Smith as sureties, covering the amount of certain prices of all fertilizer shipped to appellee, conditioned for the faithful performance of the duties of the latter as agent, etc.

The appellant was entitled to the custody and control, under the provisions of the contract aforesaid, of the farmers' notes aforesaid which were uncollected on October 6, 1910, because the appellee then, without the consent of appellant, ceased all attention to the business of said agency and accepted other employment in the State of Florida from that date until the latter part of May, 1911. Further—

At the time of such breach of contract by appellee, although 1,176-1/6 tons of fertilizer had been sold by appellee, as much as 1,000 tons had not been collected for by it, or by it and appellant.

The decree complained of contains the following adjudications, which are drawn in question, namely:

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(a) It confirmed the last report of the commissioner aforesaid (which was the final result of his several reports), and decreed that the appellee pay over unto the appellant the sum of $1,313.23, with interest thereon at the legal rate from July 15, 1910, "the same being the amount found due the said plaintiff (appellant) by the said defendant (appellee) after allowance of all proper credits."

(b) It further decreed that the appellee be "absolved and released * * * from further liability * * * as endorser" on said notes; and that upon the payment by appellee to appellant of said sum of $1,313.23, with interest as aforesaid, "both the said defendant (appellee) and its surety upon a certain bond herein filed" (being the bond above mentioned) "shall be absolved and released."

Appellant complains of the provisions of said decree referred to in sub-paragraph (b) next above, and urges that the evidence returned with said commissioner's reports is insufficient to sustain the decree in this particular, in that it does not show such laches or other conduct on the part of appellant as would release the appellee from his liability as endorser aforesaid. This is the sole assignment of error by appellant. We will first consider this assignment of error.

1. Whether there was such conduct amounting to such failure on the part of the appellant to perform its duties under said contract as in equity relieved the appellee as endorser of said notes from liability to the appellant (plaintiff in the court below), on the principle that he who asks equity must do equity, depended upon the conduct of the appellant as shown by the evidence before the commissioner.

In his first report the commissioner reached the conclusion from the evidence before him that the appellee was "not liable in any way (as endorser or otherwise) to the plaintiff (appellant) on account of said notes" and so reported. As above stated, there was no exception to that

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report by the appellant, nor to any of the said commissioner's reports. Under the well-settled rule on the subject, the evidence in the cause cannot be looked to by us to ascertain whether the conclusion aforesaid of the commissioner was sustained or not sustained by the evidence. On the face of the reports aforesaid no error is apparent in such conclusion. No exception having been taken by appellant in the court below, as aforesaid, it is too late for it to raise the objection in this court on appeal. *Morrison* v. *Householder*, 79 Va. 627; *Hansucker* v. *Walker*, 76 Va. 753; *White's Ex'r* v. *Johnson*, 2 Munf. (16 Va.) 285. The conclusion of the commissioner and the adjudication of the court, by the decree complained of based thereon, aforesaid, were, therefore, final and conclusive upon appellant and are not open to review in this court. Hence, we cannot sustain the assignment of error of appellant.

The cross-assignments of error of appellee involve two questions only, which will be considered in their order as stated below, which were raised by exceptions by appellee to the two commissioner's reports aforesaid first filed.

2. Were the commissioner's reports and the decree aforesaid thereon correct in allowing the appellee its compensation of $2.00 per ton only on the proceeds of fertilizer sales collected by appellee and appellant and received by appellant and not on the gross sales by appellee?

The commissioner reports sales by appellee of 1,177-1/6 tons of fertilizer and allowed appellee his compensation above mentioned of $2.00 per ton on all proceeds of such sales which were collected by appellant and appellee and received by appellant and which will be received when appellee shall have paid to appellant the $1,313.23 balance due to the latter above mentioned. The decree complained of by appellee made the same allowance. Appellee claims, however, that it should have been allowed said $2.00 per ton on all of its sales of 1,177-1/6 tons of fertilizer, regardless of

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the fact that some of the farmers' notes therefor were never collected. Appellee makes this claim on the ground that appellant withdrew certain of the farmers' notes, among which were those uncollected, from the hands of appellee and also otherwise prevented appellee from collecting such notes, by placing them in the hands of an attorney for appellant and notifying the farmers to pay the notes only to such attorney or to appellant direct; and appellee contends that this was a breach of contract by appellant and that but for such breach of contract by appellant appellee would have collected approximately (*sic*) all of such notes. As above noted, one of the facts in the case is that under the provisions of the contract aforesaid the appellant was entitled to the custody and control of the farmers' notes aforesaid, which were uncollected on October 6, 1910, because the appellee, without the consent of the appellant, then ceased all attention to the business of said agency and accepted other employment in the State of Florida from that date until the latter part of the next May, which was a breach of said contract by appellee. This fact is decisive of the question under consideration, and necessarily leads to the conclusion that the withdrawal of said notes aforesaid and the undertaking by appellant of the collection of such notes to the subsequent exclusion of the appellee in the matter after May, 1911, was not a breach of said contract on the part of appellant. Hence, there was no error in the commissioner's report, or in the decree complained of, on the point in question.

3. Were the commissioner's reports and the decree complained of thereon correct in failing to allow the appellee the $500 bonus aforesaid?

By the terms of the contract aforesaid, as shown by the evidence in this cause, the bonus in question was not agreed to be paid unless and until the appellee should sell, collect and settle with appellant for as much as 1,000 tons of fer-

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tilizer. Further, as above noted, there was a breach of said contract by the appellee on October 6, 1910, and at that time, while 1,177-1/6 tons of fertilizer had been sold by appellee, as much as 1,000 tons had not been "collected for." Under the provisions of the contract, appellant had the option to avail itself of the personal services of appellee in the collection of said notes. This was a material part of the consideration for the promise of appellant to pay said bonus. That it was material is admitted by appellee by its contention that its services, even after May, 1911, were valuable to appellant and would have been effective to the extent of collecting approximately all of the unpaid farmers' notes, if it had been permitted, after its said breach of contract, to undertake that task. And the promise by appellant, aforesaid, was indeed expressly conditioned, not only upon the sale, but the collection *by appellee* of the proceeds of sales of as much as 1,000 tons of fertilizer, which was in fact the condition that appellee should give its personal attention to the collection of the proceeds of that amount of such sales. Hence, the breach by appellee of the contract, in the particular aforesaid, abrogated the promise aforesaid in respect to said bonus. Therefore, there was no error in the commissioner's report, or in the decree complained of, because of the failure to allow appellee said bonus.

For the foregoing reasons, we are of opinion to affirm the decree complained of, both as to the assignment of error by the appellant and the cross-assignments of error by the appellee.

Affirmed.

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Richmond.

POCAHONTAS GUANO COMPANY v. SMITH.

January 24, 1918.

1. FACTORS AND COMMISSION MERCHANTS—*Del Credere Factors.*—A *del credere* factor, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; he is distinguished from other agents in that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. The relation of a *del credere* agent to his principal is that of debtor and creditor, and he is bound absolutely to see that his principal is paid, and he may be sued in *indebitatus assumpsit* if he does not pay the sale debt when due. *Del credere* guaranties are held not to be within the statute of frauds, as being promises to answer for the debt, default, or miscarriage of another, but are original agreements of suretyship and may be proved by parol.
2. SALES—*Factors and Commission Merchants—Distinction Between Contract of Sale and Consignment of Goods to a Factor.*—The distinction between a contract of sale and a consignment of goods to a factor is that in the case of a sale the title passes to the buyer, while in the case of a consignment to a factor the possession passes to the factor but the title remains in the consignor. Where goods are delivered by one party to another, to sell for the party delivering them, it creates the relation of agency and the title remains in the principal, and the factor or agent is liable to pay, not a price, but to account for the proceeds of the goods when sold. If, however, it appears from the whole agreement that it is the intention of the parties that the title to the goods is to pass to the party receiving them, for a price to be paid by him, then the transaction is a sale.
3. SALES—*Factors and Commission Merchants—Distinction Between Contract of Sale and Consignment of Goods to a Factor—Intention Governs.*—Where a contract contains some provisions characteristic of a sale and others characteristic of a consignment to a factor to determine whether it is a sale or

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a consignment, there must be applied to it the familiar rules of construction, all of which are subordinate to the leading principle, that the intention of the parties must prevail, unless inconsistent with some rule of law.

4. SALES—*Factors and Commission Merchants—Distinction Between Contract of Sale and Consignment of Goods to a Factor—Case at Bar.*—In the instant case, the contract under consideration amounted merely to a consignment of fertilizers by one party to another to be sold by the latter for the benefit of the former, who has never parted with the title, and there was no element of purchase in the agreement. In such case, the relation is that of principal and factor, and not of seller and buyer. The fundamental difference between the agreement in *Arbuckle Bros.* v. *Gates*, 95 Va. 802, 30 S. E. 496, and others of that type, called "special selling factor appointment," and the agreement in the case at bar, is that in the former the consignees acquired such an interest in the property under the agreement that the title passed, and the consignor was the seller and the consignee the buyer of the property; while, in the latter case, the title remained in the consignor and only the possession of the fertilizers passed to the consignee.

Appeal from a decree of the Circuit Court of Orange county. Decree for defendant. Complainant appeals.

Reversed.

This controversy grows out of the construction of the following contract:

"Messrs. Swan Carpenter Co.,

"Orange, Va.

"Dear Sir:—We agree to consign to you the following named brands and quantities of fertilizers, and as much more as may be mutually satisfactory, to be sold by you as our agent, for our account, upon the terms and conditions named in this agreement; and we authorize you to sell them at such prices as to net us the amounts set opposite the brands respectively, after taking out your commission and expenses.

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Statement.

	Ammonia.	Avail. Phos. Acid.	Potash.					
Eagle Mt. Truck	2½	8	6	$24.70	per	ton	2000	lbs.
Imperial Phos		14		$12.20	"	"	"	"
Waukesha		16		$12.70	"	"	"	"
Cherokee		8	4	$13.75	"	"	"	"
Apex Tobacco	3	8	3	$23.65	"	"	"	"
Wabash		10	4	$14.75	"	"	"	"
Big Joe Grain Guano,	1.21	9		$16.10	"	"	"	"
Carrington Tobacco Guano	2	8	2	$19.45	"	"	"	"

"We will ship the fertilizer in car lot and prepay freight to Orange and Rapidan.

"Fertilizers are to be stored by you in a good dry house and to be insured by you, the expense of such storage and insurance to be a part of the price you will charge the purchasers of said fertilizers over and above the net amounts to be received by us as above, and not to come out of said net amounts.

"Settlements for the fertilizers sold by you is to be made July 1, 1913.

"If sales are made on time they are to be payable Dec. 1, 1913.

"On such goods as are paid for on July 1, 1913, there is to be deducted from the net time prices seven (7) per cent discount. And you are to deliver to us or our order, when called for, all cash, notes, accounts, or other proceeds of sales of fertilizers sold, and you are besides to guarantee the payment of all sales made; also waive all homestead exemptions as to obligations under this contract.

"In the event notes should be taken from you, as a further evidence of your guaranteeing the sales made by you, said notes to be made payable at your Bank of Orange, and we are to be at liberty to use said notes and have the same

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discounted and when paid by you, you will be entitled to the notes, accounts or other proceeds of sale for which they were given as the guarantee.

"We reserve the right to suspend or cancel this agreement as to any part of the fertilizers undelivered, in case of any occurrence regarded by us as unfavorable to your credit, or any unavoidable accident or occurrence, or act of any authority or authorities preventing us from delivering the fertilizers.

"It is further agreed, that in any and all sales of the above fertilizers made by you, such sales are to be made with guarantee only of the analysis on the sack, and not of the results from their use, or otherwise.

"And it is distinctly understood and agreed that all of the above fertilizers to be consigned to you as herein provided as our agent, remains our property until sold by you, and that after sale by you, the cash, notes, accounts, or other proceeds of sale are our property, and are to be accounted for by you as such and relinquish and assign to us all your interest in any lien, mortgage or account taken by you, due you for goods sold or money loaned to parties who have purchased any of the above fertilizers from you until the amount due us for said fertilizers is fully paid.

"It is further agreed that no verbal understandings with salesmen will be recognized unless expressed in this agreement.

"This contract is subject to approval of Pocahontas Guano Co.

"POCAHONTAS GUANO CO.,

"A. B. CARRINGTON, Salesman.

"A rebate of 50c. per ton allowed on alkaline and acid and $1.00 goods ammoniated in final settlement will be allowed.

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"Pocahontas Guano Co., Lynchburg, Va.

"Gentlemen: I accept the above agreement on the terms and conditions therein stated.

"Dated Feby. 11, 1913.

"SWAN CARPENTER CO., INC.
Per S. A. CARPENTER, Sec'y & Treas."

From a decree construing the foregoing agreement to be a contract of sale, this appeal was taken.

Shackelford & Shackelford, for the appellant.

Browning & Browning, for the appellees.

WHITTLE, P., after making the above statement, delivered the opinion of the court.

The sole question on this appeal is whether the contract that we are called on to construe creates a *del credere* agency or a sale.

In approaching the consideration of this question, it will be helpful to do so in light of certain general principles of law applicable thereto.

The duties of a *del credere* factor are thus defined in 11 R. C. L., section 3, page 754:

"A *del credere* factor, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; he is distinguished from other agents in that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. The relation of a *del credere* agent to his principal is that of debtor and creditor, and he is bound absolutely to see that his principal is paid, and he may be sued in *indebitatus assumpsit* if he does not pay the sale debt when due. *Del credere* guaranties are

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held not to be within the statute of frauds, as being promises to answer for the debt, default, or miscarriage of another, but are original agreements of suretyship and may be proved by parol."

The learned editors of that valuable work, in section 4, at page 755, distinguish a consignment to a broker from a contract of sale as follows:

"The distinction between a contract of sale and a consignment of goods to a factor is that in the case of a sale the title passes to the buyer, while in the case of a consignment to a factor the possession passes to the factor but the title remains in the consignor. Where goods are delivered by one party to another, to sell for the party delivering them, it creates the relation of agency, and the title remains in the principal, and the factor or agent is liable to pay, not a price, but to account for the proceeds of the goods when sold. If, however, it appears from the whole agreement that it is the intention of the parties that the title to the goods is to pass to the party receiving them, for a price to be paid by him, then the transaction is a sale. Though the distinction is usually plain and simple the authorities are full of illustrations of how difficult the application may be, because the same contract contains some provisions characteristic of each. To the agreement there must be applied the familiar rules of construction, all of which are subordinate to the leading principle, that the intention of the parties must prevail, unless inconsistent with some rule of law. And this intention must be gathered not from separate clauses considered independently of others, but from all the terms of the contract considered together. A contract of sale transferring the title of the goods, and not a mere agency, is made by an agreement called 'special selling factor appointment,' under which the consignee is required to pay for the goods within sixty days, whether sold or not, at an amount fixed in advance, with certain allow-

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ances for carting, storing, insuring, and selling, whether the goods are carted, stored, insured, or sold or not, without requiring the consignee to make any account of sales or to keep the proceeds thereof separate, but giving him all the advantage and risk of the advancement or decline of prices."

This clear exposition of the distinction between a consignment to a factor or broker and a contract of sale is sustained by the authorities cited in the notes, and the decision of this court in *Arbuckle Bros.* v. *Gates & Brown*, 95 Va. 802, 30 S. E. 496.

In the latter case the court held that the agreement established the relation between the parties of seller and buyer and not of consignor and consignee; and an instrument identical in all respects with the agreement in that case was similarly construed by the Supreme Court of Tennessee in *Arbuckle Bros.* v. *Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Arbuckle Bros.* v. *Gates & Brown, supra,* is relied on by appellees as decisive of this case. It is true that the last named case and other well considered cases hold that the fact that title is retained by the consignor until the property is sold is not in itself determinative of the character of the transaction, but that the nature and legal effect of the agreement is to be ascertained from a consideration of all its stipulations, taken together, and that the intention of the parties shall prevail, unless inconsistent with some rule of law, over the mere name by which the instrument may be called, or from separate clauses thereof considered individually. *McGaw et al.* v. *Hanway*, 120 Md. 197, 87 Atl. 666; 35 Am. & Eng. Anno. Cases (1915 A), 601, and note.

In view of the foregoing principles let us endeavor, by comparison of the contract in *Arbuckle Bros.* v. *Gates & Brown, supra,* with the agreement in the instant case, to give to the latter its proper classification. The true import of the former instrument can best be determined by quoting

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the language of that distinguished jurist (Judge Riely) who wrote the opinion of the court. He says: "The agreement purports, on its face, to be a 'Special Selling Factor Appointment' * * * It starts out by declaring that all goods consigned by Arbuckle Brothers to Gates & Brown * * * shall, until sold in regular course of business, remain the property of Arbuckle Brothers, with the title in them, and be merely held by Gates & Brown as their factors; and that they shall never purchase the goods for their own account. * * * That Gates & Brown shall sell and bill the goods in their own name, but only at such prices and on such terms as Arbuckle Brothers may give them from time to time. Then follows a number of stipulations that are irreconcilable with the relation of factorship, or an agency between the parties. Gates & Brown are required not only to assume all risk as to the credit of the persons to whom they may sell the goods, and to make all collections at their own expense, but they are to guarantee the sale of each 'consignment' and the payment therefor within sixty days from its date. They are required to remit the full amount of each 'consignment,' less a paltry sum designated as commissions, by the end of sixty days, whether the whole 'consignment' shall have been sold or not, and whether the proceeds of sale shall have been collected or not. They are further required to insure Arbuckle Brothers against decline in the price of unsold goods, and shall be entitled to the benefit of any advance in the price of them. No provision whatever is made for the return of any goods that may not be sold, nor for the reclamation of any moneys paid by Gates & Brown for the coffee. No account of their sales is required to be rendered to Arbuckle Brothers, and they acquire no information as to the persons to whom Gates & Brown may sell the goods; but Gates & Brown become primarily the absolute debtors of Arbuckle Brothers for the goods, whether they ever dispose of them or not. They are required to pay for them at the price fixed at the

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date of each 'consignment,' at a fixed time, whether they have then sold them or not, or whether they have collected the proceeds of sale or not. * * * The agreement was an attempt to accomplish that which cannot be done: To make a sale of personal property and at the same time constitute the buyer simply an agent of the seller to hold the property until it is paid for."

Stript of the disguise of non-essential phraseology, the above transaction obviously was the equivalent of a sixty days sale by Arbuckle Brothers to Gates & Brown of all goods consigned to them at a fixed price, for which they at once became responsible, and necessarily at the same time acquired an interest in the goods amounting to title.

On the other hand, an analysis of the agreement in the case in judgment shows the existence of a *del credere* agency and not a sale. By the terms of the latter instrument, the consignors agreed to ship certain named brands and quantities of fertilizers to the consignees to be sold by the latter as their agent on their account, upon terms and conditions named in the agreement. The prices of the different brands of fertilizers were fixed by the consignors, who were to receive the net proceeds of sale after deducting expenses and the consignees' commission. Fertilizers were to be stored and insured by the consignees, these charges to be added as part of the price charged to purchasers. Settlements for fertilizers sold by the consignees were to be made by them July 1, 1913; and time sales made by the consignees were to be payable December 1, 1913. On goods paid for on July 1, 1913, there was to be deducted from the net time prices seven per cent discount. The consignees were to deliver to the consignors, or their order, when called for, all cash, notes, accounts, or other proceeds of sales of fertilizers sold; and also to guarantee the payment of all sales made; and in the event notes should be taken from the consignee as further evidence of their guaranteeing sales made by them, such notes were to be made payable at the Bank of

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Orange, the consignors to be at liberty to use and have the same discounted; but when such notes were paid by the consignees, they were to be entitled to the notes, accounts or other proceeds of sale, for which they were given as a guaranty. Upon all sales of fertilizers the consignees were only to guarantee the analysis on the sack, and not results from their use. And lastly, it was agreed that all fertilizers consigned to the consignees under the agreement were to remain the property of the consignors until sold, and that after sale the cash, notes, accounts, or other proceeds of sale were consignors' property, and to be accounted for as such by consignees, who, furthermore, were to relinquish and assign to consignors all their interest in any lien, mortgage, or account taken by, or due to consignees for goods sold or money loaned to parties who had purchased any of the above fertilizers from consignees until the amount due consignors therefor was fully paid.

The fundamental difference between the agreement in the Arbuckle Brothers case and others of that type, and the agreement in this case, is that in the former the consignees acquired such an interest in the property under the agreement that the title passed, and the consignor was the seller and the consignee the buyer of the property; while, in the latter case, the title remained in the consignor and only the possession of the fertilizers passed to the consignee. There is no element of purchase in the agreement in the instant case. It amounts merely to a consignment of goods by one party to another to be sold by the latter for the benefit of the former, who has never parted with the title. In such case, the relation is that of principal and factor, and not of seller and buyer.

Our conclusion is that the title to the property did not pass from the Pocahontas Guano Co., Inc., to the Swan Carpenter Co., Inc., and therefore the decree must be reversed and the case remanded for further proceedings.

Reversed.

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Richmond.

POWERS AND OTHERS v. CITY OF RICHMOND.

January 24, 1918.

1. TAXATION—*Municipal Corporation—Constitutional Law.*—The act of March 6, 1900 (Acts 1899-1900, p. 944, ch. 864), entitled an act to amend and re-enact certain sections of the act of May 24, 1870, providing a charter for the city of Richmond and the acts amendatory thereof, is not invalid as being in conflict with section 16, Article X, of the Constitution of 1869, or with section 50 of the Constitution of 1902. These constitutional provisions are substantially similar, providing that every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and a reference to any other law to fix such tax or object shall not be sufficient. The act referred to simply extends the lien of the city of Richmond for taxes and neither imposes, continues nor revives a tax.
2. TAXATION—*Constitutional Law Section 16, Article X, of the Constitution of 1869, Section 50 of the Constitution of 1902.*—These provisions that a law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is applied, apply only to ordinary and general taxes for State purposes, and such as are imposed generally on all the taxable property in the State, and not to local taxes for local purposes. From the earliest date, the local authorities in the counties and cities of the Commonwealth have by the General Assembly been authorized to impose local taxes, and fix the rates thereof.
3. TAXATION—*Assessment—Life Tenant and Remainderman.*—Under section 465, Code 1904, property is properly assessed for taxation in the name of the life tenant, and when so assessed the taxes constitute a lien on the property.

   TAXATION—*Municipal Corporations—Constitutional Law—Section 117 of the Constitution of 1902.*—The act of March 6, 1900 (Acts 1899-1900, p. 944, chapter 864), entitled an act to amend and re-enact certain sections of the act of May 24, 1870, providing a charter for the city of Richmond and the acts amendatory thereof, securing to the city a lien on the

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interest of a remainderman in property assessed to the life tenant, is not unconstitutional as violative of section 168 of the Constitution of 1902, in view of section 117 of the Constitution of 1902, preserving municipal charters.

5. MUNICIPAL CORPORATIONS—*Constitutional Law—Effect of Constitution of 1902 on Municipal Charters.*—Many charters existed in Virginia at the time the new Constitution was adopted, and many of them had and still have special provisions; and section 117 of the Constitution was clearly intended to continue all such special acts, except in so far as they were repealed by the Constitution or by the General Assembly. In addition to this, section 1 of the schedule of the Constitution expressly preserves all existing statutes which are neither repugnant to the Constitution nor expressly repealed.

6. STATUTES—*Objects Expressed in Title—Extending Lien of City.*—The act of March 6, 1900 (Acts 1899-1900, p. 944, chapter 864), is not void because violative of section 52. Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title. The title of that act expressly states that it relates to the lien of the city for taxes assessed on real estate, and to the sale thereof for non-payment of taxes, and that a statute with such a title is sufficient to sustain the provision that the lien of the city for taxes shall be on the land and every interest therein is manifest.

7. TAXATION—*Due Process of Law.*—The act of March 6, 1900 (Acts 1899-1900, p. 944, chapter 864), providing that the lien of the city of Richmond for taxes shall be on the land and every interest therein, is not unconstitutional as violating the fourteenth amendment of the Constitution of the United States. Where a tax is levied on property according to its value, the law must afford an adequate method for the correction of errors, and where this is done it constitutes due process of law, and the due process clause of the fourteenth amendment is satisfied if an opportunity be given to all those who are interested to question the validity of the amount of the tax either before that amount is ascertained, or in subsequent proceedings for its correction.

8. TAXATION—*Municipal Corporations—Limitation of Time Within Which City of Richmond May Enforce Lien.*—There is no limitation on the time within which the city of Richmond may enforce the lien which it has under its charter for taxes assessed by the city on real estate; the city charter prescribes no limit.

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Appeal from a decree of the Chancery Court of Richmond, in which the city of Richmond was allowed to file its petition. Decree for the petitioner. Defendants appeal.

Affirmed.

The opinion states the case.

Robert H. Talley, for the appellants.

H. R. Pollard, for the appellee.

PRENTIS, J., delivered the opinion of the court.

The city of Richmond filed its petition in the pending cause of *Powers* v. *Powers,* alleging that certain property known as No. 3116 east Broad street, Richmond, Va., had been purchased by direction of the court in that cause for the use of Annie I. Talley (who was the widow of Jefferson Powers, deceased), during her life, with remainder to the appellants, his children; and asserting the claim of the city to a lien for $774.61 and interest, alleged to be due for taxes thereon from 1905 to 1915, inclusive. These taxes had accrued during the time the property was held and occupied by Mrs. Powers, the life tenant. The appellants filed an answer to that petition, denying the existence of the lien for taxes against their interests as remaindermen, and denying that the taxes claimed had been legally or properly assessed upon the property, as well as the authority of the city to levy therefor, insisting that the taxes were a lien upon the life estate only, and that the provisions of the charter of the city under which the claim for taxes is based are violative of both the Federal and State Constitutions.

The property having been sold under decree of court, a sufficient sum was retained to satisfy the claim of the city.

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The trial court determined that the city was entitled to the amount of the taxes claimed, entered its decree to this effect, and from that decree this appeal was taken.

The claim of the city is based upon an act approved March 6, 1900 (Acts 1899-1900, p. 944), entitled an Act to amend and re-enact sections 75, 76, 78, 79, 80, 82 and 83, of the act approved May 24, 1870, providing a charter for the city of Richmond and the acts amendatory thereof, relating to the lien of the city for taxes assessed as real estate, and to the sale thereof for non-payment of taxes. These amendments to the charter of the city were passed at the session of the legislature immediately succeeding the decision of the case of *Tabb* v. *Commonwealth*, 98 Va. 47, 34 S. E. 946, 51 L. R. A. 283, which held that neither State nor city taxes assessed on real estate held by a life tenant constituted a lien upon the interest of the remaindermen in property so assessed. The avowed purpose of securing these amendments to the charter was to secure to the city a lien on such interests, and to this end section 75 provides, that there shall be a lien on all real estate and on each and every interest therein for city taxes assessed thereon from the commencement of the year for which they are assessed; section 79, that any person having an interest in such real estate by way of reversion, remainder or otherwise, may redeem the same, if the land has been sold for such taxes; section 82, that nothing in that section shall be construed to affect or impair the lien of the city on said real estate, and on each and every interest therein, or to affect, limit or impair the right of the city when it becomes a purchaser of such real estate at a delinquent tax sale; and section 83, that the city may, at any time, elect to enforce its lien for such taxes in a court of equity. There can be no doubt whatever that this act, if valid, fully sustains the decree of the trial court.

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1. It is claimed by the appellants, among other things, that this act was invalid at the time of its adoption, because section 16, of Article X, of the Constitution of 1869, provides that "Every law which imposes, continues or revives a tax, shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object," as well as under section 50 of the present Constitution (Code 1904, p. ccxx), which provides that, "Every law imposing, continuing or reviving a tax shall specifically state such tax, and no law shall be construed as so stating such tax which requires a reference to any other law or any other tax." These sections are substantially similar, so that it may be said that if invalid under that section of the present Constitution it was invalid under the former Constitution. We cannot, however, accept the suggestion that either of these sections is in conflict with the act referred to. The act simply relates to the lien of the city for taxes. It neither imposes, continues nor revives a tax, and so the constitutional provisions referred to do not affect the question. While we think the language of the two Constitutions is sufficient thus to settle this question, it is nevertheless not difficult to find authority to sustain that construction.

In 37 Cyc. at p. 228, this is said: "The Constitutions of several States provide that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. It is held, however, that this applies only to the ordinary and general taxes for State purposes, and such as are imposed generally on all the taxable property in the State, and not to local taxes for local purposes, or to special taxes on peculiar kinds of property, or such as are in the nature of license or occupation fees; nor does the provision apply to laws which merely provide or regulate the machinery for assessing and collecting the tax." The notes to the text refer to many authorities which sustain it.

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To uphold the position of counsel for the appellants would be to disrupt a system of taxation which has always been in force in Virginia, and as we believe in most of the States of the Union. From the earliest date, the local authorities in the counties and cities of the Commonwealth have by the General Assembly been authorized to impose local taxes, and fix the rates thereof.

In *Gilkeson* v. *Frederick Justices*, 13 Gratt. (54 Va.) 583, this is said: "The power of the General Assembly to confer authority on county courts, city councils, corporations and other organized bodies to impose local taxes for local purposes, had been exercised from the adoption of the first Constitution down to the formation of the last. The rates and subjects of taxation were different in many instances, if not in all; the powers conferred were not always the same, but were varied to meet the exigencies of particular circumstances, and frequently were left to the discretion of the body on which they were conferred. All this was known to the convention; yet no explicit provision was inserted in the Constitution changing this power of the General Assembly. Surely if a change in the whole scheme of local taxation was intended, the convention would have expressed the intention in plain terms, and not have left us to arrive at it by a forced construction."

In *Henrico County* v. *City of Richmond*, 106 Va. at p. 296, 55 S. E. at p. 688 (117 Am. St. Rep. 1001), this is said: "If there is any sovereign power universally recognized as legislative in its character, it is the power to levy taxes; and yet this court has held that the General Assembly had power to confer upon the county courts authority to levy taxes for local purposes." Citing, *In re County Levy*, 5 Call 139; *Harrison Justices* v. *Holland*, 3 Gratt. (44 Va.) 247; *Gilkeson* v. *Frederick Justices*, 13 Gratt. (54 Va.) 583.

The inconvenience of any other construction is perfectly apparent. The legislature would be driven to the necessity

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of making such local rates uniform in the various counties and cities of the Commonwealth, for it would be without the information to enable it to pass laws providing for the various rates of taxation necessary in order to meet the varying local needs.

There have been several cases in Virginia holding that municipalities with charters like that of the city of Richmond, have general powers of taxation, with power to tax all subjects within their jurisdiction, even though the State does not levy a tax upon such subjects. *City of Norfolk* v. *Norfolk Landmark*, 95 Va. 564, 28 S. E. 959; *Newport News, etc., Co.* v. *Newport News*, 100 Va. 157, 40 S. E. 645; *Woodall* v. *Lynchburg*, 100 Va. 318, 40 S. E. 915; *Myers, Receiver* v. *Richmond*, 110 Va. 605, 66 S. E. 826.

There can be no doubt, then, that the sections of the Constitution above referred to do not restrain the legislature to the extent asserted, and that that legislation is not invalid under these sections of either the old or the new Constitution. This statute simply extends a lien, and does not relate to the imposing, continuing or reviving of taxes.

2. It is also claimed that in order for the lien to attach there must have been a valid assessment, and this of course is true; and that because the property was assessed for taxation in the name of the life tenant, therefore, it could not affect the interest of the remaindermen. It must be remembered, however, that it is an assessment of the property itself which is involved.

Section 465 of the Code provides: "In the table of tracts of land the commissioner shall enter each tract separately, and set forth in as many columns as may be necessary the name of the person who by himself or his tenant has the freehold in possession, his place of residence, the nature of his estate, whether in fee or for life, the number of acres in the tract," etc.

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It is the value of land that is assessed, and under the statute must be assessed in the name of the person who by himself or his tenant has the freehold in possession. He it is who under the Virginia statutes is assessed with the property, and it is well settled that if the person so assessed has an estate for life, it is his duty to pay the taxes.

In Cooley on Taxation, Vol. I, pages 731-2, this is said: "By the owner of property for purposes of taxation is meant the legal and not the equitable owner; therefore, trustees having the legal title are properly assessed. * * * A life tenant should be assessed as owner during the continuance of the life estate." And in Vol. I, pages 866-7, this author also says: "Not only is it competent for the State to charge land with a lien for the taxes imposed thereon, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property with precedence of all other claims and liens whatsoever. * * * When that is done the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the *res* without regard to individual ownership."

In Burroughs on Taxation, p. 223, the same rule is thus stated: "In the assessment of a general tax, the law does not regard the different interests in the assessment. It looks to the person having the present right of enjoyment of the land to be assessed, whether tenant for life or years, for the tax on the fee simple value of the land, and such person is the one to be assessed with the land."

"The word 'owner' includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee." 17 Am. & Eng. Ency. L: (1st ed.), 299, 300, approved in *Richmond* v. *Williams*, 102 Va. 733, 740, 47 S. E. 844.

In *Osterburg* v. *Union Trust Co.*, 93 U. S. 428 (23 L. Ed. 965), this is said: "A lien for taxes does not, however, stand upon the footing of an ordinary encumbrance; it is

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not displaced by a sale under pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res*, without regard to individual ownership, and when it is enforced by sale, pursuant to statute prescribing the mode of assessing and collecting, then the purchaser takes a valid unimpeachable title."

Section 128 of the Constitution (Code 1904, p. ccxliii), which simply follows a statute which had long been in force in Virginia, requires that in cities and towns the assessment of property, real and personal, for purposes of municipal taxation, shall be the same as the assessment thereof for purposes of State taxation.

So, then, under the Virginia statute, the property was properly assessed, in the name of the life tenant, and if properly assessed, the taxes constitute a lien thereon.

3. It is claimed, however, that the statute is unconstitutional and void because of section 168 of the Constitution (Code 1904, p. cclxii), which reads thus: "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

This question has been settled in this State in the case of *Standard Oil Company* v. *City of Fredericksburg*, 105 Va. 87, 52 S. E. 817. In that case the city of Fredericksburg assessed a license tax upon the oil company, by virtue of its authority under its charter. The company contended that the license tax was unconstitutional, invalid and void because of sections 117, 168 and 170 of the Constitution of Virginia (Code 1904, pp. ccxxxviii, cclxii).

Section 117 at that time provided: "General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner pro-

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vided in article four of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house. But each of the cities and towns of the State having at the time of the adoption of this Constitution a municipal charter may retain the same, except so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this atricle, or otherwise provided in this Constitution.''

And section 170 authorizes the State to levy a license tax upon any business which cannot be reached by the *ad valorem* system.

In the opinion in that case, this appears: "The power of the city to levy the licenses in these two cases is denied, because, since the State exacts no such license, and since section 168 of the Constitution provides that the license tax 'shall be levied and collected under general laws,' that if the city ever had the power under its charter, that power is taken away by section 117 of the Constitution, which amends the charter of the city to conform to section 168 of the Constitution, and that such a license could be required only under *general law* thereto especially authorizing all the cities of the Commonwealth to levy such a license tax.

"This contention has been decided against the plaintiff company by the Supreme Court of Appeals of Virginia in *Hicks* v. *Bristol*, 102 Va. 861, 47 S. E. 1001, and in *Arey* v. *Lindsay*, 103 Va. 250, 48 S. E. 889. In this latter case the court says: 'There is no indication of a purpose to repeal existing laws, valid when passed, whether special enactment or otherwise.'

"The manifest purpose of the authors of the Constitution 'was to meet and obviate the evils attending the passage of special acts' and that 'the Constitution did not intend to abrogate a charter or any part of it,' because it had been

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passed as a 'special act, but only such features of the charter as were in conflict with the Constitution, and to forbid special acts in the future.' "

Many charters existed in Virginia at the time the new Constitution was adopted, and many of them had and still have special provisions; and section 117 of the Constitution was clearly intended to continue all such special acts, except in so far as they were repealed by the Constitution or by the General Assembly. In addition to this, section 1 of the Schedule of the Constitution (Code 1904, p. cclxxiii) expressly preserves all existing statutes which are neither repugnant to the Constitution nor expressly repealed.

4. It is also contended that the statute referred to is void because violative of section 52 of the Constitution (Code 1904, p. ccxxi), which provides, that "No law shall embrace more than one object, which shall be expressed in its title." It is sufficient to say as to this, that the title of this act expressly states that it relates to the lien of the city for taxes assessed on real estate, and to the sale thereof for non-payment of taxes, and that a statute with such a title is sufficient to sustain the provision that the lien of the city for taxes shall be on the land and every interest therein is manifest. *Commonwealth* v. *Chesapeake & Ohio Ry. Co.*, 118 Va. 267, 87 S. E. 622.

5. It is further contended that the act is violative of the fourteenth amendment of the Constitution of the United States.

Judge Cooley, in his work on Taxation, at pp. 55-6, says this: "In order to bring taxation imposed by a State, or under its authority, within the scope of the provision of the fourteenth amendment, which prohibits the deprivation of property without due process of law, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the power to tax.

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A State has the right to devise its own system of taxation free from Federal interference." *Richmond* v. *Williams*, 102 Va. *supra*.

In *Turpin* v. *Lemon*, 187 U. S. 51, at p. 58, 23 Sup. Ct. 20, at p. 23, 47 L. Ed. 70, it is said that, "Laws for the assessment and collection of general taxes stand upon somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary."

In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 10 Sup. Ct., 533, 33 L. Ed. 895, it is said, that taxation does not require the same kind of notice as is required in suits at law; and that "it involves no violation of due process of law when it is executed according to the customary forms and established usages, or in subordination to the principles which underlie them."

This principle may be gathered from numerous cases, that where a tax is levied on property according to its value, the law must afford an adequate method for the correction of errors, and where this is done it constitutes due process of law, and that due process clause of the fourteenth amendment is satisfied if an opportunity be given to all those who are interested to question the validity of the amount of the tax either before that amount is ascertained, or in subsequent proceedings for its correction.

Section 444 of the Code of Virginia provides opportunity for a hearing and an adequate method for the correction of errors. That section now reads: "Any person feeling himself aggrieved by the assessment of his lands or lots may, upon giving notice to the assessor and to the attorney for the Commonwealth, apply to the circuit court of the county or corporation court of the corporation in which the land lies, at any time prior to the first day of February of the second year after such assessment, and not after, to have the assessment of his lands and lots corrected," etc.

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The property here involved was as well the property of the remaindermen as the property of the life tenant, and it is for the benefit of the remaindermen that it is assessed in the name of the life tenant, and that the law imposes a personal liability therefor upon him as well as the duty of paying the taxes as they accrue; but if the life tenant fails in that duty, such failure cannot relieve the property of the remaindermen from the lien, though they are not personally liable for the taxes. Their property is liable, and section 168 of the Constitution requires that all property shall be taxed. So that the results in this case are strictly in accord with the intent of the Constitution, and to relieve the property in this case would be to exempt the estate of the remaindermen from taxation during the period when the life tenant held it.

In the case of *Powell's Ex'r* v. *City of Richmond*, 94 Va. 79, 26 S. E. 389, it was held that there is no limitation on the time within which the city of Richmond may enforce the lien which it has under its charter for taxes assessed by the city on real estate; that the city charter prescribes no limit.

The determination of the case then depends upon whether or not the act first herein referred to is still in effect, and as to this we have no doubt whatever. The city of Richmond has a lien under its charter for the taxes upon the land itself and upon every interest therein; so that the decree will be affirmed.

Affirmed.

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Syllabus.

Richmond.

SMITH AND OTHERS v. SMITH'S EXECUTOR AND OTHERS.

January 24, 1918.

1. WILLS—*Construction—Conflict of Laws.*—The law of a testator's domicile applies in construing his will as to personality, but where a farm in Virginia is disposed of by a will, the will as to that farm must be construed with reference to the law of Virginia since the tax *situs* governs.
2. DOMICILE—*Residence.*—The words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification. To acquire a domicile in a particular place, there must be a residence there, and intention to make that place home.
3. DOMICILE—*Evidence—Probate of Will—Full Faith and Credit Clause.*—The probate of a will is not evidence in a collateral proceeding of the domicile of the testator, and other tribunals are not precluded from inquiring into the real domicile. The full faith and credit due to the proceedings of a sister State do not require that the courts of a State shall be bound by its adjudication on the question of domicile. In the trial of a collateral issue, it is open to the courts of any State, to determine, upon the evidence produced, the true domicile of the deceased.
4. DOMICILE—*Evidence—Declarations.*—A testator styled himself as "William C. Smith, of the city of Baltimore, Maryland." Such declaration on his part is entitled to little weight as evidence of his domicile in Baltimore, Maryland.
5. WILLS—*Domicile—Case at Bar.*—Although a testator died in Baltimore, Maryland, and through the necessity of his business was a resident of that city, yet it was held from his purchase of a farm in Virginia, and his relation to it, and from other evidence, that his domicile was in Virginia.
6. WILLS—*Gift of Life Estate with Absolute Power of Disposal.*—A testator gave and devised all his estate to his wife for and during her natural life, "to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple," and then he expressly added that "no interest or estate shall vest in any child or the descendants of any, until the death of my wife."

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Held: That, having denied the children in express terms any interest or estate in the property in the lifetime of his wife, this must have been because he intended his wife should have absolute control and dominion during her life; and, therefore, the wife took a fee simple.

7. WILLS—*Construction—Technical Words.*—A technical word in a will should be given its technical meaning.

8. ESTATES—*Fee Simple—Definition.*—A fee simple is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple.

9. WILLS—*Construction—Intention.*—Intention, it is often said, is the polar star to guide in the construction of wills, and when discovered effect must be given to it unless it violates some rule of law. The intent of the testator must be gathered from the will itself; from the words used, the true meaning of the words. While decided cases give much assistance in the interpretation of wills, it is also fairly true as has been said, that "No will has a twin brother;" therefore, it frequently happens, as in the instant case, that no decided case is exactly in point, the words of the will differing, though slightly, in each case.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree for defendants. Complainants appeal.

Affirmed.

The opinion states the case.

Daniel Grinnan, Hill Carter and *A. R. Dickinson,* for the appellants.

A. W. Patterson, John Phelps, Christian, Gordon & Christian, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The opinion of the Honorable William A. Moncure, judge of the Chancery Court of the city of Richmond, which fol-

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lows, is justified by the record and sufficiently supports the decree complained of, and therefore it will be affirmed.

"This is an extremely interesting case. William C. Smith died in the city of Baltimore in February, 1880, and on February 26, 1880, his last will and testament, which was dated May——, 1877, was probated in the Orphans Court of the city of Baltimore, and on May 13, 1880, a certified copy was duly probated and admitted to record by the Chancery Court of the city of Richmond, Va., and in each court Martha E. Smith, the widow, qualified as executor under the will.

"The part of the will specially to be considered is as follows:

" 'I, William C. Smith, of the city of Baltimore, Maryland, do make this my last will and testament, hereby revoking all others.

" 'Item First. I give and devise all my estate, real and personal, unto my wife, Martha E. Smith, for and during her natural life to be used and enjoyed by her as she shall think proper, as fully as if the same were hers in fee simple, and at her death, it is my will that my said estate shall pass to and be equally divided amongst all my children then living and the descendants of any deceased child, said descendants taking said child's part—that is, the part said deceased child would have been entitled to receive if living at that time. It being my will that no interest or estate shall vest in any child or the descendants of any, until the death of my wife.'

"William C. Smith left surviving him six children, four daughters and two sons.

"The inventory of his estate as filed in the orphans court footed up $6,039.14, and in 1887 the executrix filed in that court her account with the estate. This account was duly confirmed and shows that she, Martha E. Smith, 'retained the balance ($6,307.37) of the estate bequeathed to her under the last will and testament of testator subject to the provisions therein contained.'

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"In 1908 Martha E. Smith being domiciled in Virginia and a resident of Richmond, died, and her last will and testament was duly probated and admitted to record in the Chancery Court of the city of Richmond. Carroll H. Smith, her son, qualified as executor and acknowledged a bond in the penalty of $40,000 with the Virginia Trust Company as surety.

"By her will Martha E. Smith gave her entire estate to her three living children, Margaret Graves, Lavinia Graves and Carroll H. Smith. Her estate as shown by her executor's account footed up more than $40,000.00.

"The plaintiffs in this suit are the grandchildren of Wm. C. and Martha E. Smith, whose parents, Mrs. Sydnor, Mrs. Niemeyer and O. V. Smith, died after the death of Wm. C. Smith but in the lifetime of Martha E. Smith, while the defendants are Lavinia E. Graves, Margaret W. Graves and Carroll H. Smith, the sole beneficiaries under the will of Martha E. Smith, deceased, and Carroll H. Smith, executor under the will of Martha E. Smith, and the Virginia Trust Company, his surety.

"Carroll H. Smith is a non-resident of this State and is not personally before the court.

"It is the claim of the plaintiffs that William C. Smith was domiciled in the State of Maryland at the time of his death, and that by the terms of his will properly construed Martha E. Smith acquired only a life estate in his property and at her death all of said estate passed to the children of William C. Smith living at that time and to the children of any deceased child, such child or children to take the part the deceased child would have taken if alive.

"The plaintiffs further claim that the entire estate of Martha E. Smith, deceased, so administered by her executor, was no other than the trust estate given her for life by the will of W. C. Smith, together with the growth of that estate and the profits and gains resulting from fortunate

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investments and reinvestments of the same; so that the plaintiffs claim title and right to one-half of the estate of Wm. C. Smith, deceased, which estate they claim was administered and distributed as the estate of Martha E. Smith, deceased. In passing it may be stated that the evidence with fair accuracy traces some of the original estates with gains through successive purchases and sales to the property held by Mrs. Smith at her death.

"The defendants deny the claims of the plaintiffs and say that the estate of W. C. Smith passed under his will to Martha E. Smith in absolute right, and that the estate of Martha E. Smith, deceased, distributed by her executor, was her absolute property and was not impressed with any trust whatever.

"The bill alleges that William C. Smith was domiciled in Maryland, while the answer of the Graveses denies all and singular the allegations of the bill except those admitted to be true, so that the domicile of W. C. Smith must be determined.

"To interpret and construe the will of Wm. C. Smith, deceased, his domicile must be first ascertained, as the law of his domicile applies in construing the will as to personalty. *Bolling* v. *Bolling*, 88 Va. 525-6, [14 S. E. 67.]

"The farm in Orange county was disposed of by his will, so that as to the farm the will must be construed with reference to the law of Virginia since the tax *situs* governs. Minor on Conflict of Laws, sec. 11-29; sec. 12, p. 33.

"In *Pendleton* v. *Commonwealth*, 110 Va. at p. 232-3, [65 S. E. 536], the court said: 'While the words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification and including beyond mere physical presence at the particular place, positive or presumptive proof of an intention to make it a permanent abiding place * * *

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" 'To acquire a domicile in a particular place, there must be a residence there, and intention to make that place his home.'

"In *Long* v. *Ryan*, 30 Gratt. (61 Va.) 719, the court said: 'There is, however, a wide distinction between domicile and residence, recognized by the most approved authorities everywhere. Domicile is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicile, two things must concur—first, residence; secondly, the intention to remain there. *Pilson, Trustee,* v. *Bushong,* 29 Gratt. (70 Va.) 229; *Mitchell* v. *United States,* 21 Wall. 350 [24 L. Ed. 702]. Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lexicographers, residence is defined to be the place of abode, a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time.'

"To the same effect is the case of *Lindsay* v. *Murphy,* 76 Va. at p. 428, as well as the decisions of the courts of other States. *Raymond* v. *Leishman,* 243 Pa. 64 [89 Atl. 791, L. R. A. 1915 A, 400], Ann. Cas. 1915 C, 780, and note.

"The will has been probated for years, therefore the validity of the will cannot be questioned or attacked, as full faith and credit must be given to the judgment of the probate court.

"The plaintiffs offer no legal proof of domicile of W. C. Smith but seem to rely solely on the will and its probate in Maryland as proof that his domicile was Maryland.

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"It may be here stated that the settled doctrine of the Supreme Court of the United States and the English House of Lords is that the probate of a will is not evidence in a collateral proceeding of the domicile of the testator, and that other tribunals are not precluded from inquiring into the real domicile.

"In *Tilt* v. *Kelsey*, 207 U. S. 43 [28 Sup. Ct. 1], 52 L. Ed. 95, the will of Albert Tilt was probated in New Jersey, the letters testamentary granted by the surrogate described him as 'late of the county of Morris deceased,' and his estate was fully administered by the probate court of New Jersey. The State of New York sued the executors of Tilt's will in the State courts of New York for a succession tax due the State of New York, claiming that Tilt died domiciled in New York, and the question presented to the court was whether the adjudication of the New Jersey court that Tilt was, at the time of his death, a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceeding. If it was, that ended the matter. In rendering the opinion of the court, Mr. Justice Moody said: 'But, upon principle and authority, that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it as a collateral proceeding,'—citing *Thormann* v. *Frame*, 176 U. S. 350 [20 Sup. Ct. 446, 44 L. Ed. 500]; *Overby* v. *Gordon*, 177 U. S. 214 [20 Sup. Ct. 603, 44 L. Ed. 741]; *Dallinger* v. *Richardson*, 176 Mass. 77 [57 N. E. 224]; *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238 [23 L. Ed. 314]; *De Mora* v. *Concha*, L. R. Ch. Div. 268, affirmed in L. R. 11 App. Cas. 541; *Brigham* v. *Fayerweather*, 140 Mass. 411 [5 N. E. 265].

"The opinion of Mr. Justice Moody, after quoting from the opinion of Mr. Justice Holmes in the case of *Brigham* v. *Fayerweather*, *supra*, says: 'We think that this question expresses the correct rule and that it is sustained by the

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decisions of this court. Applying it here, it follows that the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicile. On the contrary, it is open to the courts of any State, in the trial of a collateral issue, to determine, upon the evidence produced, the true domicile of the deceased.'

"It is insisted by the plaintiffs that even if the letters of administration and probate of the Orphans Court of the city of Baltimore are not evidence of the domicile of Wm. C. Smith, yet the testator in his will styled himself, 'William C. Smith, of the city of Baltimore, Maryland,' and that such declaration on his part is proof of his Maryland domicile.

"In Story on Conflict of Laws, Judge Story, in discussing 'What Constitutes Domicile,' in chapter 111, section 44, note (d) on page 45, at page 46 says: 'His description of himself in legal instruments are treated as declarations, but in some cases it has been said that by themselves they are entitled to but little weight' and he cites numerous authorities in support of his statement.

"It is therefore manifest that the domicile of William C. Smith being an issue in this suit, his domicile must be determined from all of the evidence in the suit in like manner as any other fact.

"The evidence established Virginia his domicile of origin, he having been born and spent his life until middle age in Henrico county, Virginia, and the vicinity of Richmond. Prior to the Civil War he was in command of steamboats plying between Richmond and Norfolk, and between Washington and Quantico, Va. His wife was domiciled in Virginia before her marriage. After the Civil War, in the year 1865, he went to Baltimore as superintendent of the Baltimore Steam Packet Co., which ran steamers between Baltimore and Norfolk, Virginia. He owned no real estate in Baltimore, but lived with his family in a rented house or

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boarded. On June 10, 1875, his youngest daughter, Margaret, and the only unmarried child, was married to Jos. C. W. Graves, a farmer of Orange county, Virginia. After the marriage Margaret and her husband occupied as a home the husband's farm in Orange county.

"At that time Lavinia Smith Graves, another daughter of W. C. Smith, was also living with her husband, C. L. Graves, on his farm in Orange county. C. L. Graves and Jos. W. C. Graves were brothers and the two sisters, Margaret and Lavinia, having married brothers, were living near to each other, in fact their farms were subdivisions of a larger farm of the Graves estate. In October, 1875, W. C. Smith purchased a farm in Orange county, Virginia, which seems to have been the only real estate he ever owned, adjoining, or near to the homes of these two daughters. After the marriage of Margaret in June, 1875, W. C. Smith broke up housekeeping in Baltimore and boarded with his son, Carroll. W. C. Smith's will is dated May, 1877. Not attempting to quote their exact language, but only the substance, his two daughters, Margaret and Lavinia Graves, testified that his idea and purpose in buying the farm in Virginia was to be near his two daughters and to have a home there with them, and that their father so considered it and always spoke of it as home. C. L. Graves testified to the same effect. They also said their father, W. C. Smith, stocked the farm and furnished the dwelling with a view of making it his home. The record further shows that Robert Courtney, the father of Martha E. Smith, had in August, 1850, conveyed a house and lot on 2nd street, Richmond, Va., in trust for Martha E. Smith and her children, and the will of W. C. Smith expressly shows that the Orange county farm had been purchased in part with $2,400, the proceeds of the sale of trust property in Richmond, and that this had been done under decrees of the Chancery Court of Richmond. Is it not fair to presume that this transaction was

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with the consent of Martha E. Smith and that the purchase of the farm was for a family homestead?

"On October 19, 1880, Martha E. Smith as executrix (the printed advertisement is in evidence) sold all of the personal property of W. C. Smith, deceased, on this Virginia farm, consisting of household and kitchen furniture, high grade cattle, hogs, three horses, farming implements, etc. Among the items of personal use of the family thus sold it may be well to enumerate household and kitchen furniture, family carriage sold for $125, a buggy horse, a driving horse for Mrs. Smith, W. C. Smith's own riding horse and his shot gun. Margaret W. Graves says that after her father bought this farm her mother, Martha E. Smith, spent much of her time there looking after the farm. It is also shown that W. C. Smith came up to the farm all of his holidays and week ends. The last time he was at the farm he said he intended to go to Baltimore, close up his business, and come back there for good. He was then advanced in years, returned to Baltimore and was suddenly stricken with paralysis, died, and was buried in Richmond, Virginia.

"It is therefore reasonable to say that, after the purchase of the Orange county, Virginia, farm and his relation to it as set out above, his domicile was Virginia, even though from the necessity of his business he was a resident of Maryland.

"The will of William C. Smith, both as to realty and personalty, is therefore to be construed in accordance with the laws of Virginia.

"The question then is, what is the meaning of his will? What estate did his widow, Martha E. Smith, take under it?

" 'Intention, it is often said, is the polar star to guide in the construction of wills, and when discovered effect must be given to it unless it violates some rule of law.'

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Judge Burks, in *Miss. Society* v. *Calvert*, 32 Gratt. (73 Va.) at page 361.

"The intent of the testator must be gathered from the will itself; from the words used, the true meaning of the words. While decided cases give much assistance in the interpretation of wills, it is also fairly true as has been said, that 'No will has a twin brother;' therefore, it frequently happens, as in this case, that no decided case is exactly in point, the words of the will differing, though slightly, in each case.

"What then do the words, 'to be used and enjoyed by her as she shall think proper, as fully as if the same were hers in fee simple,' as used by the testator, mean?

"It is clear that without these words Martha E. Smith would have taken a life estate only; and if these words mean nothing then she took only a life estate. But are these words meaningless? I do not think so.

"The testator's primary object was to provide for his wife, Martha E. Smith, and to this end he applied his entire estate. He begins by giving and devising to her, 'All my estate, real and personal, for and during her natural life,' this language of itself would have given her only a life estate, and then follows, 'to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple.' Having given and devised to his wife, 'all my estate, real and personal, for and during her natural life to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple,' the testator in the same clause of his will adds, 'it being my will that no interest or estate shall vest in any child or the descendants of any until the death of my wife.'

"In view of the right that he had given his wife to use the estate 'as fully as if the same were hers in fee simple,' what possible reason was there, or could he have had, for adding the clause or sentence referred to, unless it be that

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during her life his wife was to have absolute dominion and control over all his estate 'to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple.' He expressly said no interest or estate was to vest in any child or the descendants of any until the death of his wife, thus giving the whole estate to his wife during her life with absolute control and use of it to the same extent as if the entire estate was an absolute estate in the wife. The wife was given the power of absolute dominion and control, and the testator's children or descendants had by the express words of the will no vested interest or estate until the death of the wife.

"If one has the right and power to use and enjoy property as one thinks proper to the same extent as the law gives to one owning a fee simple title, then the one who has such right and power is the fee simple owner of that property.

"What is 'fee simple'? In Kent's Commentaries, Volume IV, page 5, 'It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple.'

"Now appropriately insert for the words 'fee simple' in W. C. Smith's will the above definition and we would have, 'I give and devise all my estate, real and personal, to my wife, Martha E. Smith, for and during her natural life to be used and enjoyed by her as she shall think proper as fully as if the same were hers in perpetuity and with unlimited power of alienation, and at my death it is my will,' etc.

"The inserted words would give Martha E. Smith unlimited power of alienation or disposition, and yet the inserted words are, as shown, just what 'fee simple' means. The technical word should be given a technical meaning.

"In *Burwell's Ex'r* v. *Anderson*, 3 Leigh (30 Va.) at

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pages 355-6, Judge Tucker said: 'From the earliest time, it has been among the received doctrines of the common law, that an absolute and unqualified power of disposing conferred by will, and not controlled or explained by any other provision, should be construed as a gift of the absolute property. In this the law but corresponds with the dictates of common reason. Every man of ordinary capacity would understand the power to dispose of a thing as he pleased as a gift of the thing itself; and hence every one who uses the phrase without qualification, is understood by the law as intending a gift. The power of absolute disposition is, indeed, the eminent quality of absolute property. He who has the absolute property, has inseparably the absolute power over it; and he to whom is given the absolute power over an estate, acquires thereby the absolute property; unless there is something in the gift which negatives and overthrows this otherwise irresistible implication.'

"In the argument of Mr. Conway Robinson of the case of *May* v. *Joynes*, 20 Gratt. (61 Va.) at page 703, the principle is expressed as follows: 'When a life estate is created in terms, and to this is added a power of ulterior disposition, unconfined as to mode or object, no case has been produced suggesting that this power is naked power, and requiring to be executed in order to divest the grantor of the fee. Such power united to such an interest, is not a power requiring to be actually executed, but the two together are descriptive of the most absolute title known to the law'—citing as authority *Pulliam* v. *Byrd*, 2 Strob. Eq. [S. C.] 134, 138.

"In *Bowen* v. *Bowen*, 87 Va. at page 440 [12 S. E. 885, 24 Am. St. Rep. 664], Judge Lacy says the words, 'In fact, during the life of my said wife, I wish her to possess and enjoy the said property, as if she enjoyed a fee simple and absolute estate,' fully express a gift of the absolute property.

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"Contrast the similarity of the above quoted words with the words used by W. C. Smith and now under consideration.

"In *Missionary Society* v. *Calvert*, 32 Gratt. (73 Va.) at page 363, in speaking of the will then being construed by the court, Judge Burks said, 'the language imports absolute dominion, and absolute dominion is one of the best descriptions of absolute property.'

"And so it seems under the will of Wm. C. Smith his wife had absolute dominion, since she had power to use the property as she thought proper as fully as if it were hers in fee simple, that is, as if it were hers in perpetuity with unlimited power of alienation.

"The rule which controls in decisions of this character is thus stated by Judge Harrison in *Farish* v. *Wayman*, 91 Va., page 430 [21 S. E. 810]. Says he: 'That an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee.'

"He also says this principle of law has become so firmly fixed that 'it may now be regarded as a canon of property.' Reviewing the cases on this subject one finds this doctrine firmly established, from the early case of *Shermer* v. *Shermer*, 1 Wash. 266 [1 Am. Dec. 460], down to *Hansbrough* v. *Pres. Church*, 110 Va. 15 [65 S. E. 467], one of the latest cases.

"In *Robertson* v. *Hardy*, 23 S. E. 766 (2 Va. Dec. 275), Judge Riely says: 'Absolute dominion imports absolute ownership. When it is the intention of the testator that the first taker shall have an unlimited power of disposition over the property devised or bequeathed, whether such intention be expressed, or necessarily implied, a limitation over to another is void.'

"In the case of *Honaker* v. *Duff*, 101 Va. 675 [44 S. E. 900], the doctrine of *May* v. *Joynes* is reviewed at length and the two articles on the subject, one by Judge Burks in

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1 Virginia Law Register, at page 219, the other by Prof. Charles A. Graves in 3 Virginia Law Register at page 65, are fully considered, and from that case the doctrine may be thus stated: Where the limitation is of a life estate, but there is given full power of disposition over the fee, which, if conferred without limitation or restriction as to time, mode or purpose of its exercise, such full power of disposition would serve to enlarge the life estate expressly given into a fee simple by implication.

"In the instant case the testator gave and devised all his estate to his wife for and during her natural life, 'to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple,' and then he expressly added that 'no interest or estate shall vest in any child or the descendants of any, until the death of his wife.' Thus he denied the children in express terms any interest or estate in the property in the lifetime of his wife, and this must have been because he had intended his wife should have absolute dominion and control during her life.

"In their answer the defendants set up the plea of *res adjudicata*, and in proper order that should have been treated first. Suffice it to say, the case of *Sydnor* v. *Graves*, 119 Md. 321 [86 Atl. 341], was in favor of the defendants on grounds which did not preclude this suit.

"The conclusion reached is that under the will of W. C. Smith his wife had an absolute estate (fee simple) in the entire property, and she having by her will disposed of her own estate, in which the plaintiffs had no interest, they cannot recover in this suit.

"The bills will be dismissed."

Affirmed.

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Richmond.

SMITH v. WOODWARD AND OTHERS.

AND

STORY, TRUSTEE, v. WOODWARD AND OTHERS.

January 24, 1918.

1. MORTGAGES AND DEEDS OF TRUST—*Powers of Trustee—Sale of More Property than Necessary to Satisfy the Debt.*—The owner of three parcels of real estate, consisting of a tract of land, a dwelling house and a factory lot, conveyed it to a trustee to secure the payment of a bond. Subsequently, two other deeds of trust were executed by the owner, on the same property, to the same trustee, to secure creditors. Upon default upon the first bond and upon demand for sale the owner requested the trustee to advertise only the dwelling and the factory lot, and not the farm. The trustee refused and said he would advertise the whole. The trustee did not advertise at that time, but did subsequently advertise the property to be sold under the first deed of trust. No request for a sale was made under the other deeds of trust, nor did it appear that the debtor was in any default in relation thereto. In making the sale the trustee claimed to have acted upon the request of the grantor, but it appeared that whatever authority, if any, had been conferred by the request of the grantor, was withdrawn before the sale, and the trustee was requested not to sell any more land than was necessary to pay the debt. The farm was sold first and brought enough to satisfy the debt secured and the costs. After the sale of the farm the trustee sold the dwelling and the factory lot. From the advertisement of the sale it appeared that the property was to be sold under the first deed of trust and that the sale under that deed was to be made at the request of both the debtor and the creditor.

   Held: That, the decree of the circuit court setting aside the sale of the dwelling house and adjusting the rights of the parties must be affirmed.

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2. MORTGAGES AND DEEDS OF TRUST—*Sale—How Much of the Property Should be Sold.*—It is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject without saying or so much thereof as may be necessary to satisfy the purposes of the trust. That is always implied, unless a contrary intention plainly appears.

3. MORTGAGES AND DEEDS OF TRUST—*Powers of Trustee—Sale of More Property than Necessary to Satisfy the Debt—Estoppel of Owner.*—In the instant case it was contended that the debtor was estopped by his conduct from objecting to the sale, and, in support of that contention, reliance was placed upon the fact that the sale was advertised as at the request of the debtor, that such request had in fact been made, and that he had held the trustee out as his agent to sell, that he was present at the sale and made no announcement of his revocation of his authority, and raised no objection at the time to the fairness and legality of the sale. It appeared, however, that the consent given was for a sale under the first deed *for the purposes of that deed*, that the debtor was not actually present when the dwelling was sold, and, if the trustee had been constituted the agent of the debtor to sell his land, he was a special agent, with limited authority, and the purchaser dealt with him at his hazard. The debtor was on the ground and could easily have been consulted, and, if consulted, it would have been ascertained that no such agency as was claimed had ever been created, or, if created, it had been revoked.

4. MORTGAGES AND DEEDS OF TRUST—*Powers of Trustees—Sale of More Property than Necessary to Satisfy the Debt—Consent of Debtor.*—In the instant case the consent of the debtor to the sale of the dwelling house after the farm had been sold for sufficient to satisfy the debt secured and the costs, could not be implied from his assent to an arrangement by which he was to have possession of the farm and the rents, issues and profits thereof, for the remainder of the year in which the sale was made.

5. MORTGAGES AND DEEDS OF TRUST—*Several Deeds of Trust—Rights of Creditors Secured by Subsequent Deeds at Sale under First Deed.*—In the instant case, at the time of the sale under the first deed, there had been no default under the second and third deeds, and the creditors secured therein had no control over, or right to interfere with, the sale being made under the first deed.

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6. MORTGAGES AND DEEDS OF TRUST—*Trustee's Sale—Caveat Emptor.*—The rule of *caveat emptor* applies with full force to sales made under deeds of trust to secure creditors. The deed is the chart by which the trustee is to be governed. He is a special agent with designated powers, and a purchaser at a sale made by him takes upon himself the risk not only of the fairness of the sale, but of the regularity thereof, and of his compliance with all the substantial requirements of the instrument under which he acts. Such purchaser is chargeable with notice of the extent and limitation of the trustee's powers. He is bound not only by *actual* notice, but by *constructive* notice as well, which is the same in effect as actual notice. If he has notice, actual or constructive, that the trustee is exceeding his authority in making the sale, or is not complying substantially with the terms of the instrument creating the power of sale, he does not occupy the position of a purchaser without notice.

7. MORTGAGES AND DEEDS OF TRUST—*Sale of Trust Property—Purchaser without Notice.*—In the instant case, the purchaser at the trustee's sale had constructive notice of the contents of the deed under which he purchased, and of the amount of the debt secured, and, being also the purchaser of the farm, he knew that the farm had brought ample to pay that debt; he knew, therefore, that the deed had served its purpose, and that it was improper for the trustee to undertake to make further sales under that deed, and that such sales would at least be irregular.

8. MORTGAGES AND DEEDS OF TRUST—*Sale of Trust Property—Purchaser without Notice.*—One who was present at the sale and bid $3,600 on the dwelling which was cried out to the purchaser at $3,650, and had notice of the same facts with which the purchaser was chargeable, as stated in the preceding headnote, and afterwards paid the purchaser $100 for his bargain, taking his deed directly from the trustee, stands on no higher footing than if the property had been cried out to him at the trustee's sale.

9. MORTGAGES AND DEEDS OF TRUST—*Sale—Rights of Purchaser at Irregular Sale.*—In Virginia, the legal title which is vested in the trustee of a deed of trust to secure the payment of a debt, may be conveyed by him without compliance with the conditions named in the deed, as the trustee has an estate coupled with an interest and not a mere naked power; consequently, an irregular sale by a trustee to a purchaser who has paid his money and obtained a deed from the trustee is valid in law. But in equity the rule is otherwise, and the title of a

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purchaser at such a sale will not be upheld unless there has been at least a substantial compliance with the terms of the deed conferring the power of sale, and if a sale is made after the debt secured has been paid, it will be set aside.

10. MORTGAGES AND DEEDS OF TRUST—*Sale—Rights of Purchaser at Irregular Sale.*—The trustee had the power to make a deed to the purchaser in the instant case, in the sense that he was invested with the legal title and could convey that legal title to another, and the grantee would be the owner at law, but it is not true that the grantee would thereby acquire the beneficial ownership of the land as between him and the grantor in the trust deed.

11. MORTGAGES AND DEEDS OF TRUST—*Sale—Unauthorized Act of Trustee.*—A court of equity will not permit a grantor in trust to be deprived of his property by an unauthorized act of the trustee, and will set aside a sale and conveyance where the trustee has exceeded the authority conferred upon him, or sold the grantor's land after the purposes of the trust have been accomplished, and especially where the purchaser has notice, actual or constructive, of the facts.

12. MORTGAGES AND DEEDS OF TRUST—*Setting Aside Sale—Allowance for Improvements by Purchaser.*—Code of 1904, section 2760, allowing recovery for improvements restricts such recovery to one "holding the premises under a title believed by him * * * to be good." This section has no application to one who is not a *bona fide* purchaser, and a person with notice, actual or constructive, of infirmity in his title cannot recover for improvements.

13. MORTGAGES AND DEEDS OF TRUST—*Setting Aside Sale—Allowance for Improvements by Purchaser.*—Where suit is brought to set aside a trustee's sale under a deed of trust within about forty days after the date of the sale, and thirty days after the purchaser obtained his deed, the grantor is not chargeable with negligence in bringing his suit, and of standing by and seeing the purchaser put valuable improvements on the place without making known his objections.

14. MORTGAGES AND DEEDS OF TRUST—*Suit to Set Aside Sale—Proper Parties.*—While in the instant case a part of the debt secured by the first deed of trust was originally paid from the proceeds of the dwelling, yet before the decree complained of was entered, the terms of sale of the farm and factory had been complied with, and the court, with ample funds in hand, by the decree complained of, readjusted the rights of the parties so as to indemnify the other funds from the proceeds of the sale of the farm and thereby in effect to discharge the full amount of the debt secured by the first deed of trust from the

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proceeds of the farm, and leave the residue of the proceeds of the farm and the whole of the proceeds of the dwelling and peanut factory to the creditors secured by the second and third deeds of trust. This was a proper method of procedure, and as the debt secured by the first deed of trust was wholly discharged from the proceeds of the farm, the creditor was neither a necessary nor proper party to the suit to set aside the sale of the dwelling.

15. APPEAL AND ERROR—*Reversal—Substantial Justice.*—Where substantial justice has been reached and the rights of all parties in interest have been adequately safeguarded by the decree appealed from, the Supreme Court of Appeals will not be astute to find technical objections by which such decree may be reversed.

Appeal from a decree of the Circuit Court of Southampton county. Decree for complainants. Defendants appeal.

Affirmed.

The opinion states the case.

Buford & Peterson, R. R. Hicks and *E. Frank Story*, for the appellants.

J. N. Sebrell, Jr., for the appellees.

BURKS, J., delivered the opinion of the court.

This was a suit to set aside a sale of real estate made by a trustee under a deed of trust to secure a creditor. The circuit court set the sale aside, and from its decree setting aside the sale and adjusting the rights of the parties consequent thereon separate appeals were taken by the purchaser and by the trustee.

Benjamin P. Woodward and wife, by deed bearing date June 1, 1912, conveyed to E. Frank Story, trustee, three parcels of real estate, consisting of a tract of land, a dwell-

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ing house and a factory lot, in trust to secure to Mrs. Pattie M. Story the payment of a bond for $7,000, of even date with the deed. The deed provided that "in the event that default shall be made in the payment of the above described bond, or any part thereof, principal or interest, when the same shall be demanded, then the trustee on being thereto requested by the then legal holder of the said bond, shall sell the property hereby conveyed at public auction to the highest bidder for cash." The deed then proceeds to describe the terms of advertising and the application of the purchase money to the payment of the expenses of sale and the debt secured, and directs that the residue, if any, shall be paid to the grantors. The deed also requires the grantors to keep the dwelling insured for at least the sum of $4,000. The deed does not prescribe the order in which the different parcels shall be sold, if a sale should become necessary. Subsequently, two other deeds of trust were executed by the same grantors, on the same property, to the same trustee, to secure creditors. One bearing date January 27, 1915, secures to F. P. Pope a bond for $3,933.33, bearing even date with the deed, payable on demand, and the other bearing date February 5, 1915, secures to J. Davis Woodward a bond for $2,542.81, bearing even date with the deed, and payable on demand.

B. P. Woodward made default in the payment of principal and interest of the debt secured in the first deed, and the creditor secured was demanding its enforcement. In the latter part of December, 1914, or early in January, 1915, and before either of the last two deeds of trust had been executed, B. P. Woodward, the debtor, upon being informed by the trustee of the demand for a sale under the first deed, requested the trustee to advertise only the dwelling and the factory lot, and not the farm. The trustee did not assent to this, but said he would have to advertise the whole. The trustee did not at that time advertise the property for

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sale, but he did subsequently, and after the date of the last deed of trust, advertise the property to be sold under the first deed of trust, and stated in the advertisement that the sale was to be made at the request of the beneficiary in that deed and of B. P. Woodward, the grantor therein. The sale was advertised to take place at 12 o'clock on March 20, 1915. The amount of Mrs. Story's debt was then about $6,700. At that time, it does not appear that any demand had been made for any part of the debts secured in either of the last two deeds of trust, recently theretofore executed, or that the debtor was in any default in relation thereto. On this subject, the trustee says: "No default in interest on the last two, if I remember. Wait a minute—I am not sure about that. I don't think there was any default in the interest of the last two, because they had been recently given for the purpose of closing up the indebtedness that was then past due by Mr. Woodward." Certainly no request for a sale under either of those deeds had been made by any one, and the trustee testifies that he did not advertise nor pretend to sell under either of them. So far as the deeds are concerned, the sale was made solely under the power conferred by the first deed of trust. It is true that the trustee also claims to have acted upon the request of the grantor, but we shall see later on that whatever authority, if any, was conferred by the request of the grantor in the preceding December or January was withdrawn before the sale, and the trustee was requested not to sell any more land than was necessary to pay the debt secured by the deed under which the sale was being made.

The creditors secured in all three of the deeds of trust were present or represented on the day of the sale. The debtor made earnest efforts that day to obviate the necessity for the sale, and negotiations were conducted several hours between him and the creditor secured in the first deed looking to a postponement of the sale, but they were inef-

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fectual, and the sale which was to have taken place at twelve o'clock did not commence until sometime between two and three o'clock. There is conflict in the testimony as to what took place before the sale relating to what was to be sold and as to several other matters. The trustee was insisting upon a sale of all of the property conveyed, and seems to have been under the impression that the debtor assented to it, provided possession of the farm was not given until January 1st, following, and that the debtor be allowed to take the rents for that year. The debtor, however, insists that this arrangement applied only to the sale of the farm, and that he insisted that no more land should be sold than was sufficient to pay the debt secured in the first deed under which the sale was being made. In this matter, the debtor was represented by Mr. R. Howard, president of the Bank of Newsoms. He is very positive in his statements as to what transpired about the sale. He says he told the trustee that he was representing the debtor, and, after giving other conversations, he says, in speaking of a conversation with the trustee, "I then requested him not to sell any more than enough property to satisfy the deed of trust of Mrs. Pattie Story, as the other property was not advertised, and he told me under the terms of the deed of trust he would have to sell all." Referring again to the same subject, the witness says: "He then told me that he would have to sell the whole of it. There was no question. I asked him not to sell any more than would satisfy Mrs. Story's deed of trust—if he would satisfy Mrs. Story's deed of trust it would not be necessary to sell any more. He said under the terms of the deed of trust he would have to sell it all. I told him I thought after satisfying the deed of trust he could not sell any more, and he said he could do it, and would have to do it." The trustee does not deny this, but says, "so far as the specific request that I sell enough property only to satisfy the trust deed I do not recall. I do not be-

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lieve Mr. Howard would make a statement that he did not believe to be true, but if such a request was made of me, in the language read, or otherwise, I do not recall it." The statements of Mr. Howard are fully sustained by the testimony of the debtor, Woodward, and are not contradicted by any witness, except so far as the testimony of the trustee may be regarded as a contradiction. There can be little doubt, upon this testimony, that the request was made, and it is conceded that it was not granted. It is also conceded that, at the request of the debtor, the farm was the first piece of property offered, and that it brought $8,800. The debtor testifies that he requested that the farm should be sold first because he was satisfied it would bring sufficient to pay the debt secured and the costs. Mrs. Story's debt was originally $7,000, and bore interest from June 1, 1912, so that, if no payments had been made thereon, it amounted, on the day of sale, to about $8,178, thus leaving upwards of $600 to cover expenses. As a matter of fact, however, the debt amounted to only about $6,700, so that there could be no question that the farm brought more than enough to pay the debt. The debtor states that he made no further remonstrance about the sale of additional property, and went into the store in front of which the property was being sold, and does not know in what order the other pieces of property were sold. After the sale of the farm, the trustee sold the dwelling and the factory lot, and J. Davis Woodward became the purchaser of each, and afterwards transferred his purchase of the dwelling to J. W. Smith, under circumstances hereinafter to be stated. It is the sale of this piece of property which is the chief subject of contention in this litigation.

After the debtor was notified by the trustee that Mrs. Story, the beneficiary in the first deed, was demanding a sale to pay her debt, he requested the trustee to advertise and sell the dwelling and factory, as he then desired, for

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reason stated by him, to retain the farm. This was a request for a sale *under the deed,* and was made before the second and third deeds were executed. The record does not disclose any other request by the debtor of the trustee for the sale of his property. The advertisement of the property, though referred to in the deposition of B. P. Woodward as filed therewith, does not appear in the record, but from a copy thereof in the petition for appeal it appears to be an advertisement of a trustee's sale, that the property was to be sold under the deed of trust to secure Mrs. Story, bearing date June 1, 1912, and that the sale *under that deed* was to be made at the request of both the debtor and the creditor. There is nothing to show that the trustee was to go outside of his duty as trustee and sell property as the agent of the debtor. Indeed, it is stated in the brief of counsel for the trustee that "he does not claim that the action of the trustee is indefeasible because the appellee requested the sale, or because the property was advertised for sale as at appellee's request," but bases his contention on the consent of the debtor given on the day of sale. This contention, we think, has already been sufficiently disposed of.

It is earnestly contended by counsel for the appellants that B. P. Woodward, the debtor, is estopped by his conduct from objecting to the sale, and, in support of that contention, reliance is placed upon the fact that the sale was advertised as at the request of the debtor, that such request had in fact been made, that he held the trustee out as his agent to sell, that he was present at the sale and made no announcement of his revocation of his authority, and raised no objection at the time to the fairness and legality of the sale. These positions have probably already been sufficiently answered by what has been hereinbefore stated, but it may be added that it appears that the consent given was for a sale under the first deed *for the purposes of that deed,* that the debtor was not actually present when the dwelling was sold, but

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was in the store house, and more particularly, if the trustee had been constituted the agent of the debtor to sell his land, he was a special agent, with limited authority, and the purchaser dealt with him at his hazard. Huffcut on Agency, section 104. Woodward was on the ground and could easily have been consulted, and, if consulted, it would have been ascertained that no such agency as was claimed had ever been created, or, if created, it had been revoked. The only "request" to sell ever made by the debtor, and the only "agency" created, was for the sale under the first deed of trust, and when sufficient property had been sold to satisfy this debt, the "request" was granted, and the "agency" terminated. At the time of the sale there had been no default under the second and third deeds, and the creditors secured therein had no control over, or right to interfere with, the sale being made under the first deed. The limit of authority of the trustee under the first deed was to make sale of the property conveyed for the payment of the debt therein secured, but he was insisting on the right to sell the whole of the property conveyed, although it was much more than sufficient to pay the debt secured by the first deed. The debtor was heavily involved, and it seemed manifest if the property was not then sold, the creditors secured in the second and third deeds would immediately demand sales under their deeds, and the trustee seemed to have thought that further advertisements and sales under those deeds would involve the debtor in useless expense, and cause unnecessary delay and hazard to the creditors, and he was insisting on a sale of all the property conveyed. This the debtor was opposing, but the trustee proceeded with the sale.

The trustee and the purchaser at his sale of the dwelling now insist that the sale was made by the trustee with the consent and approval of B. P. Woodward, the debtor, and their chief reliance is upon the testimony of the trustee, whose testimony on this subject is as follows:

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"I do not remember whether it was suggested by me or by Mr. B. P. Woodward and the lien creditors, that if a sale of the property be had, and Mr. B. P. Woodward remain in possession of the property until the following January 1st, or the remainder of the year in which the sale was made. Mr. Howard said he would confer with Mr. Woodward concerning this, and I remember distinctly that he returned and told me that that would be satisfactory to Mr. Woodward. I did not proceed to sell the property until this information was given me by Mr. Howard. I then proceeded with the sale in front of the bank, as advertised, but before either piece of the property was offered I made the statement that the farm would be sold subject to delivery on the first day of January following, and that the rents, issues and profits thereof would belong to Mr. B. P. Woodward during the present year, that is the year of the sale, and the sale was accordingly had."

The trustee is the only witness who testifies to these facts, and it is by no means clear that B. P. Woodward meant by this concession of the rents to authorize, or consent to, a sale of the residue of his property after such strenuous efforts to prevent it. Even with the reservation of the rents, the farm sold for more than enough to pay the debt secured, and this doubtless corresponded with the preconceived opinion of the debtor. Moreover, the witness states "that if a sale of *the* property be had, and B. P. Woodward remain in possession of *the* property until the following January," etc. (italics supplied); thus showing that the statements referred to by the witness were restricted to the farm, as he was not accorded and did not have the possession of any of the property after the sale except the farm. Furthermore, it is not unusual for creditors in such cases to make concessions of that kind to an insolvent debtor and postpone the time of occupancy by the purchaser. The concession in this case, which seems to

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have been made after the trustee had announced his purpose to sell all of the property, cannot be construed into an acquiescence in, or consent to, such declared purpose of the trustee in the face of the positive evidence of the disinterested witness Howard, that he "then requested him not to sell any more than enough property to satisfy the deed of trust of Mrs. Pattie Story," and of B. P. Woodward, the debtor, who testifies that "Mr. Story promised that the sale would stop as soon as the deed of trust was satisfied." As no sale could be forced except under the first deed, and as the debtor was making strenuous efforts to prevent a sale even under that, it is not reasonable to suppose that his whole attitude towards the subject would be suddenly changed and that he would consent to a sale of all the property conveyed, merely to save rent for nine months, when it was wholly unnecessary for the payment of the debt for which alone his property could be then sold. We do not think that he is estopped, either by his words or conduct, from objecting to the sale. In our view of the evidence, the sales of the dwelling and of the factory lot, were made after the trustee had sold sufficient property to discharge the debt secured by the deed under which he was acting, and without the approval or consent of B. P. Woodward, the grantor in said deed. We must consider, therefore, the effect of these sales.

The rule of *caveat emptor* applies with full force to sales made under deeds of trust to secure creditors. The deed is the chart by which the trustee is to be governed. He is a special agent with designated powers, and a purchaser at a sale made by him takes upon himself the risk not only of the fairness of the sale, but of the regularity thereof, and of his compliance with all the substantial requirements of the instrument under which he acts. Such purchaser is chargeable with notice of the extent and limitation of the trustee's powers. He is bound not only by *actual* notice,

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but by *constructive* notice as well, which is the same in effect as actual notice. If he has notice, actual or constructive, that the trustee is exceeding his authority in making the sale, or is not complying substantially with the terms of the instrument creating the power of sale, he does not occupy the position of a purchaser without notice. *Norman* v. *Hill*, 2 Pat. & H. 676; *Wissler* v. *Craig*, 80 Va. 22, 32; *Sutton* v. *Sutton*, 7 Gratt. (48 Va.) 234, 56 Am. Dec. 109; *Wells* v. *Estes* (154 Mo. 291), 55 S. W. 255; *Shippen* v. *Whittier*, 117 Ill. 282, 7 N. E. 642; *Kenney* v. *Jefferson County Bank* (12 Colo. App. 24), 54 Pac. 404; *Improvement Co.* v. *Whitehead*, 25 Colo. 354, 54 Pac. 1023, 71 Am. St. Rep. 140.

In the instant case, J. Davis Woodward, the purchaser at the trustee's sale, had constructive notice of the contents of the deed under which he purchased, and of the amount of Mrs. Story's debt, and, being the purchaser of the farm, knew that the farm had brought ample to pay that debt. He knew, therefore, that the deed to secure Mrs. Story's debt had served its purpose, and that it was improper for the trustee to undertake to make further sales under that deed, and that any such sales would at the least be irregular.

The courts are not agreed as to the rights at law of a purchaser at an irregular sale by a trustee who has paid his money and obtained a deed from the trustee. A number of States, including Kentucky, Tennessee and Texas, hold that the sale is a nullity. Probably a majority, including Alabama, Illinois, Missouri, New York, North Carolina, Virginia and West Virginia, hold the sale valid at law, and that the legal title which is vested in the trustee may be conveyed by him without compliance with the conditions named in the deed. The basis of this doctrine is said to be that the trustee has an estate coupled with an interest and not a mere naked power. *Sulphur Mines Co.* v. *Thompson*, 93 Va. 293, 25 S. E. 232; *Dryden* v. *Stephens*, 19 W. Va. 1.

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For a collection of cases in other States, see 28 Am. & Eng. Ency. Law (2d ed.) 785-6. But the rule is otherwise in equity. In that tribunal, the title of such a purchaser will not be upheld unless there has been at least a substantial compliance with the terms of the deed conferring the power of sale, and if a sale is made after the debt secured has been paid, it will be set aside. *Wasserman* v. *Metzger,* 105 Va. 744, 54 S. E. 893, 7 L. R. A. (N. S.) 1019; *Gibson* v. *Jones,* 5 Leigh (32 Va.) 370.

In *Stephens* v. *Clay,* 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328, it is said:

"Trust deeds given as security, and mortgages containing a power of sale, vest the legal title in the trustee. The equity of redemption or equitable title remains in the mortgagor or 'trustor,' *i. e.,* the owner. The legal title of the trustee is supplemented by a power which authorizes him, upon default in payment of the mortgage debt, to advertise and sell the property; the right to exercise this power, as we shall presently see, being dependent upon his possession of such legal title. The object of the power of sale is not to enable him to convey the legal title vested in himself, but to clothe him with authority to sell and convey the equitable title remaining in the trustor. He may divest himself of the legal title without compliance with the conditions of the trust. But a sale and deed, except in strict compliance with the power specified, is of no effect whatever, so far as the trustor's equitable estate is concerned. If the trustee, in disobedience of the trust conditions, by deed transfer the legal title, his grantee takes only the trustee's interest. He steps into the trustee's shoes, so to speak, and holds subject to all received rights of the trustor. Neither courts of law nor courts of equity regard the trustee's deed as absolutely void. Both recognize the fact that it conveys the legal title. The difference is, that the grantee's title or ownership cannot be challenged at law, while equity treats

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him as a successor to the trust and protects the trustor's estate. Equity does not vacate the trustee's deed and regard the title as remaining in him."

In a monographic note by Judge Freeman to *Tyler* v. *Herring*, 67 Miss. 169, 6 So. 840, 19 Am. St. Rep. at pages 274, 278, it is said:

"If a trust has been created merely for the purpose of securing the payment of a debt, and the power of sale is to be exercised in default of such payment, the weight of authority favors the rule that the continued existence of the debt is essential to the continuation of the power of sale, and that a sale is void if made after the debt has been paid: *Penny* v. *Cook*, 19 Iowa, 538; *Mills* v. *Traylor*, 30 Tex. 7; *Murdock* v. *Johnson*, 7 Cold. (Tenn.) 605; or after a tender of payment has been made: *Welch* v. *Greenalage*, 2 Heisk. (Tenn.) 209. It is impossible for an intending purchaser to know with certainty whether or not a debt, to secure the payment of which a trust deed has been given, is fully paid. The application of this rule is attended with occasional hardships, but it is difficult to deny that the rule itself follows as an inevitable result of the other rule, that when the purposes of a trust have been fully accomplished the estate of the trustee ceases. The rule is also, in many instances, the logical and necessary result of another rule, to the effect that a power to sell upon default in the payment of a debt or other obligation makes such default a condition precedent to the existence of the power, and that the power can never precede the existence of such condition. Nevertheless, there are cases maintaining that a purchaser in good faith cannot be deprived of his purchase by showing that an accounting between the trustee and the debtor would result in the establishment of the fact that the debt had been fully paid: *Thompson* v. *McKay*, 41 Cal. 221.

"Whoever acquires title from a trustee when the instrument creating the trust shows the purpose for which the

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trustee holds title, and the terms and conditions upon which he is authorized to sell and convey, must take notice of such terms and conditions, and can never maintain a claim of title, the maintenance of which is based upon his ignorance thereof. In other words, he is not an innocent purchaser, and his title must fail if it is shown that the contingency upon which the trustee was entitled to sell and convey has never occurred: *Hill* v. *Den*, 54 Cal. 21; *Huse* v. *Den*, 85 Cal. 399 [24 Pac. 790, 20 Am. St. Rep. 232].

"The creator of a trust, the trustee of which is to have a power of sale, may impose any restraint upon such power which he may consider proper, and unless it is in contravention of law, its observance is essential to the valid execution of the power. The restraint may be in regard either to the cause of sale or the proceedings to be pursued when a cause of sale exists. The power to sell may be in abeyance until the happening of some contingency, upon which, and not before, the grantor of the trust has declared it may or shall be exercised. In the absence of the contingency, there is no existing power of sale. Thus a trustee may be given power to sell, subject to the approval of the person who created the trust, or with the assent of the beneficiary, or of the tenant for life, or of some other person. If so, the power is not in being in the absence of such approval or assent, and any conveyance which the trustee may make is unwarranted: *Sprague* v. *Edwards*, 48 Cal. 239; *Mortlock* v. *Buller*, 10 Ves. 308; *Bateman* v. *Davis*, 3 Madd. 98; *Wright* v. *Wakeford*, 17 Ves. 454; *Rickett's Trust*, 1 Johns. & H. 70."

It is true that the trustee had the power to make a deed to the purchaser in the instant case, in the sense that he was invested with the legal title and could convey that legal title to another, and the grantee would be the owner at law, but it is not true that the grantee would thereby acquire the beneficial ownership of the land as between him and the grantor in the trust deed.

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As said by Moncure, J., in *Michie* v. *Jeffries*, 21 Gratt. (62 Va.) 334: "It is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject without saying, 'or so much thereof as may be necessary to satisfy the purposes of the trust.' That is always implied, unless a contrary intention plainly appears." See also, *Cleaver* v. *Matthews*, 83 Va. 801, 3 S. E. 439. To the same effect, see *Waldo* v. *Williams*, 2 Scam. (3 Ill.) 470.

In *Grover* v. *Fox*, 36 Mich. 461, it is said: "When enough had been sold to satisfy the mortgage deed and all costs and expenses, the power was exhausted and the holders of the mortgage were without authority to make sale of more parcels."

In *Baker* v. *Halligan*, 75 Mo. 435, it is said: "When enough has been realized from the sale of a portion of the property conveyed by a deed of trust to pay the debt, the trustee's power is at an end and any further sale is a nullity."

In *Gunnell* v. *Cockerill*, 79 Ill. 84, cited by the appellant, it is said: "A purchaser under a trust deed containing a power of sale is chargeable with notice of defects and irregularities attending the sale, and their effect cannot be evaded by him. Carswell was, therefore, bound to know whether proper notice was given by the trustee of the sale, and whether the sale was made at a time and in the manner required by the power contained in the deed of trust, but as to remote and subsequent purchasers, the rule is different. *Hamilton* v. *Lubukee*, 51 Ill. 415 [99 Am. Dec. 562]."

In the instant case, J. W. Smith was not a remote or subsequent purchaser, as we shall presently see.

In *Preston* v. *Johnson*, 105 Va. 238, 53 S. E. 1, it is held that "if a trust deed requires the trustee to advertise the time, *terms* and place of sale before making sale, and he

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advertises the time and place of sale, but says nothing as to the terms, the sale made by him will be set aside as invalid at the instance of the grantor, or a prior grantee from him, who was ignorant of the time and place of sale. It is the duty of a trustee, in executing the trust, to conform substantially in all material particulars to the stipulations of the deed under which he acts."

It is apparent, therefore, that a court of equity will not permit a grantor in trust to be deprived of his property by an unauthorized act of the trustee, and will set aside a sale and conveyance where the trustee has exceeded the authority conferred upon him, or sold the grantor's land after the purposes of the trust have been accomplished, and especially where the purchaser has notice, actual or constructive, of the facts.

Counsel for the appellant, Smith, also take the position that the equities of Smith, the purchaser, are at least equal to those of the grantor, Woodward, and, as Smith has paid his money and obtained a deed, they invoke the maxim that where the equities are equal the law will prevail. But the equities are by no means equal. Woodward holds by far the better position of the two. He had no control over the sale by the trustee, and did all in his power to prevent it, whereas the trustee had no authority, in equity, to make the sale, and Smith was chargeable with notice thereof, and to this extent participated in the act. He was chargeable with notice of the amount of Mrs. Story's debt, and had actual knowledge of the fact that the farm had already been sold for more than sufficient to satisfy it and the cost. He was not a *bona fide* purchaser, because he had notice.

In view of the fact that the farm had already sold for amply sufficient to pay off the whole of the debt secured by the deed under which the trustee was acting, we confess we are unable to appreciate the force of the argument of counsel for the trustee. that the latter had the right to con-

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tinue to sell other property, because "here it is submitted we have an agreement arising by act *in pais*, whereby, upon the grantor's default, the trustee is expressly *required*—not merely *authorized* in his discretion—but required to make sale of the 'property * * * at public auction to the highest bidder for cash.' It does not merely vest in the trustee the title to the property, in order to secure the payment of the debt mentioned in the deed—does not merely create a lien to secure the payment of the debt, but expressly provides that the trustee, upon the request of the creditor, shall sell the property conveyed, and distribute the money in a specific manner."

J. Davis Woodward was not an innocent purchaser. He had full notice of the fact that the farm had sold for enough to pay the debt secured, that the deed had accomplished its purpose, and that it was improper for the trustee to proceed to sell the dwelling and factory lot. Nor do we think that J. W. Smith, the appellant, stands on any higher ground. He was present at the sale and bid as high as $3,600 on the dwelling which was cried out to J. Davis Woodward at $3,650, and also had notice of the same facts with which it is stated above that J. Davis Woodward was chargeable. Nor was he a remote purchaser. He took his deed directly from the trustee. He gave J. Davis Woodward $100 for his bargain, and the property was "turned over to Dr. Smith," or as Woodward states it, "I turned the property over to Dr. Smith simply to get rid of any more trouble concerning the matter." Smith paid Woodward $100, and then settled with the trustee for the $3,650 of purchase money which Woodward had agreed to pay the trustee for the property. This took place on the day of sale by the trustee. Smith himself admits that he just took Woodward's bid and paid him $100 for it. Under these circumstances, he cannot stand on any higher footing than if the

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property had been cried out to him at the trustee's sale. We are of opinion that the circuit court committed no error in setting aside the deed to the appellant, J. W. Smith.

The appellant, J. W. Smith, claims for improvements placed on the dwelling after he became the purchaser thereof. The circuit court refused to make any allowance therefor, and in this we think there was no error. The statute allowing recovery for improvements restricts it to one "holding the premises under a title believed by him * * * to be good." Code, section 2760. This court has held that this section has no application to one who is not a *bona fide* purchaser, and that a person with notice, actual or constructive, of infirmity in his title cannot recover for improvements. *Burton* v. *Mill*, 78 Va. 468; *Effinger* v. *Hall*, 81 Va. 94; *Fulkerson* v. *Taylor*, 102 Va. 314; 46 S. E. 309; *Nixdorf* v. *Blount*, 111 Va. 127, 68 S. E. 258; *McDonald* v. *Rothgeb*, 112 Va. 749, 72 S. E. 692, Ann. Cas. 1916 B, 63. Means of knowledge, coupled with the duty of using them, are in equity equivalent to knowledge itself. *Cordova* v. *Hood*, 17 Wall. 1, 21 L. Ed. 587. It is useless to repeat here what has already been said about appellant's knowledge or means of knowledge. It must suffice to say that he had notice, or was chargeable with notice, of such defects in the title he was obtaining from the trustee as bars him from recovery for improvements.

Much has been said in the argument about the negligent failure of B. P. Woodward, the debtor, to give notice at an earlier date of his objection to the sale, and of his standing by and seeing the purchaser put valuable improvements on the place without making known his objections. The debtor lived in the city of Norfolk, seventy-five miles from the property, and the record fails to disclose that he saw the property or knew that any improvements were being made thereon, from the day of sale until just before this suit was brought. It is not shown how much of the improvement

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was made before, and how much after, this suit was brought, and it is not clear that the alleged improvements, consisting chiefly of painting and plastering were necessary, or that the value of the premises was actually increased thereby. See Code, section 2763. However this may be, this suit to set aside the sale was brought within about forty days after the date of the sale, and thirty days after the appellant obtained his deed. The complainant was not negligent in bringing his suit. *Walker* v. *Beauchler*, 27 Gratt. (68 Va.) 511; *Wasserman* v. *Metzger*, *supra*.

It is urgently insisted that the decree of the circuit court should be reversed because the proper parties were not before the court, and the court could not properly adjust the rights of the parties, if the sale were set aside, unless all parties were before it. The only person not before the court at the time the decree was entered, and whose absence is complained of, was Mrs. Pattie Story, the creditor secured in the first deed. While it is true that a part of Mrs. Story's debt was originally paid from the proceeds of the dwelling purchased by Smith, yet before the decree complained of was entered, the terms of sale of the farm and factory had been complied with, and the court, with ample funds in hand, by the decree complained of, readjusted the rights of the parties so as to indemnify the other funds from the proceeds of the sale of the farm and thereby in effect to discharge the full amount of Mrs. Story's debt from the proceeds of the farm, and leave the residue of the proceeds of the farm and the whole of the proceeds of the dwelling and peanut factory to the creditors secured by the second and third deeds of trust. This was a proper method of procedure, and as Mrs. Story's debt was thus wholly discharged from the proceeds of the farm, she was neither a necessary nor proper party. The decree then cancelled the credits on the bonds of B. P. Woodward to F. P. Pope and J. Davis Woodward, respectively, and directed that said

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bonds be returned with credits cancelled, and also directed the trustee to refund to J. W. Smith the $3,650 collected of him. The effect of this was to reinstate the second and third deeds of trust. It would have been more regular to have substituted Smith to the lien of the second and third deeds of trust as a security for his debt, but it was admitted at the bar that the trustee is amply solvent, and as he can indemnify himself from the proceeds of sales under the second and third deeds of trust, it would seem that substantial justice has been reached, without prejudice to the rights of any of the parties. Where substantial justice has been reached and the rights of all parties in interest have been adequately safeguarded by the decree appealed from, this court will not be astute to find technical objections by which such decree may be reversed.

Affirmed.

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Richmond.

THACKER v. HUBARD AND APPLEBY, INC.

January 24, 1918.

1. PLEADING—*Time of Filing—Discretion of Court.*—A very large discretion is vested in the trial courts in the matter of the time for filing pleadings and otherwise preparing a case for hearing, and when not controlled by statute, as for example under section 3288 of the Code of 1904, their action will not be set aside unless plainly erroneous.

2. PLEADING—*Time of Filing—Defense—Application for Continuance.*—Usually the proper time for a defendant to tender his defense is when the case is called on the docket, if he has not previously done so, and if, as in the instant case, he desires a continuance, he must not only show cause for it, but the court usually requires, as a part of the price for the continuance, that he shall make up the issue, so that there may not be further cause for delay when the case is again called for trial. Of course, if good cause can be shown why the issue cannot or should not then be made up, that too will be continued. But the general rule is to require the issue to be made up before the continuance is granted.

3. PLEADING — *Time of Filing — Continuance — Time Limited by Court.*—It is not uncommon, however, for the court to grant the continuance, and, in the order granting it, to prescribe a time within which the defendant shall file his pleadings, and this is not objectionable, as it gives counsel additional time within which to prepare the pleadings, and, at the same time, by requiring the issues to be made up in advance, obviates the danger of a continuance when the case is next called for hearing. And when such time limit has been prescribed, the defendant who has not complied with the order has not "the right to demur or plead as a matter of right," but must show good cause why he has not complied with the order of the court, and if he fails to do so, it may exclude his pleadings.

4. PLEADING—*Time of Filing—Case at Bar.*—In the case at bar, in the order of continuance leave was given to the defendant to demur or plead at any time during the then term of court. The defendant did not demur or plead during that term, though the court continued in session for some days after the order

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was entered. When the case was called for trial at the term to which it had been continued, the defendant tendered his demurrer and pleas.

Held: That there was no error in the action of the court in rejecting defendant's demurrer and pleas.

5. JURISDICTION—*Objection to Jurisdiction—Time of Making.*—In the instant case, after defendant's demurrer and pleas had been rejected, he moved the court to dismiss the proceeding because a court of law had no jurisdiction of the subject matter.

Held: That the motion was a proper one, and the court rightly entertained it.

6. JURISDICTION—*Subject Matter.*—By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court and is to be sought for in the general nature of its powers, or in authority specially conferred. If not fixed by the Constitution, the legislature alone can determine of what subjects the several courts of the State shall have jurisdiction. No consent of parties can confer it, and a judgment outside of the jurisdiction so conferred is simply void.

7. JURISDICTION—*How Objection to Jurisdiction Made—Time.*—Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court, and if not brought to the attention of the trial court, it may be taken notice of by the appellate court, *ex mero motu*, for the first time.

8. MORTGAGES AND DEEDS OF TRUST—*Assumption of Mortgage Debt—Specialty or Simple Contract.*—A grantee in a deed assumed the payment of notes which the grantor had given and secured by a deed of trust upon the property conveyed as a part of the consideration for the conveyance. The deed contained an express agreement that the grantee would assume the payment of the said notes, but though the deed was accepted by the grantee it was not signed by him.

Held: That as the grantee did not sign the deed in which the payment of the notes was expressly assumed, but simply accepted it, his contract to pay was not a specialty, but a simple contract debt.

9. MORTGAGES AND DEEDS OF TRUST—*Assumption of Mortgage Debt—Action at Law by Mortgagee against Party Assuming Debt.*—Where a grantee, as a part of the consideration for the purchase of real estate, agreed by parol to pay to the grantor's debtor a debt secured by a deed of trust on the land sold, the creditor cannot sue the grantee on the promise to pay the debt because of want of privity between the creditor and the grantee.

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10. CONTRACTS—*Action for Breach—Who may Sue—Common Law.*—The general rule at common law was that, whether the contract was express or implied, by parol or under seal, or of record, the action must be brought in the name of the party in whom the legal interest was vested, and that this legal interest was vested in the person to whom the promise was made, and consequently that he or his privy was the only person who could sue in a court of law upon such contract.

11. CONTRACTS—*Action for Breach—Who may Sue—Common Law.*—Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach. Where the right of the creditor is derivative only, his remedy is in equity and not at law.

12. CONTRACTS—*Action for Breach—Who may Sue—Common Law—Exceptions.*—But some exceptions to this general rule were recognized at an early day, and others have been made since. Thus, in contracts *not under seal*, it has been held, for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B $1,000, B may in his own name maintain an action against A. But where the promise is *under the seal of the promisor*, the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representative, and not by any one *for whose benefit*, ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes*.

13. MORTGAGES AND DEEDS OF TRUST—*Assumption of Mortgage Debt—Action at Law by Mortgagee against Party Assuming Debt—Code of 1849, Chapter 116, Section 2.*—Code of 1849, chapter 116, section 2, provides that: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The act applies as well to promises (though not under seal) as to covenants, and in either case, to entitle a third person to sue thereon, the promise or covenant must have been for his sole benefit, and an agreement between the grantee of land and the grantor that the grantee should pay off and discharge the mortgage debt on the land, is not for the sole benefit of the mortgagee.

14. MORTGAGES AND DEEDS OF TRUST—*Assumption of Mortgage Debt.*—No agreement between the mortgagor and his grantee

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that the latter shall assume the mortgage debt, can change the relations of the mortgagor and mortgagee, and require the latter to treat the mortgagor as a mere surety for the debt, without the assent of the mortgagee, but when the assent of the mortgagee has been given, equity, by a quasi subrogation, and in order to avoid a multiplicity of suits, gives to the mortgagee the benefit of all the collateral obligations for the payment of the debt which the surety (mortgagor) holds for his indemnity.

15. MORTGAGES AND DEEDS OF TRUST—*Assumption of Mortgage Debt—Action by Mortgagee against Person Assuming Debt—Assumpsit.*—Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. But in the instant case there was no property or money in the hands of the grantee, as the property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency; therefore, the foregoing rule has no application to the instant case.

Error to a judgment of the Circuit Court of city of Norfolk, on a proceeding by motion for a judgment for money. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Burrow & Spindle and *James E. Heath*, for the plaintiff in error.

James G. Martin, for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is a proceeding by motion for a judgment for money, under section 3211 of the Code. The notice alleges that R. L. Portlock had given a deed of trust on certain real estate

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described in the notice to secure the payment of three negotiable notes particularly described in the notice, and that Portlock had thereafter sold and conveyed the land to the defendant who, as a part of the consideration for the conveyance, had expressly assumed the payment of said notes; that the notes had not been paid; that the real estate had been sold for the default; and that after crediting the notes with the net proceeds of sale there was still a balance due the plaintiff of $1,371, for which amount the plaintiff asked for judgment against the defendant. The notice further states that the deed from Portlock to the defendant contained the express agreement that the defendant would assume the payment of the said three notes, and that while the defendant had not signed said deed, he had expressly assumed the payment of said notes by the acceptance of said deed, and that he had further assumed the payment of the only one of said notes still unpaid by requesting, through his counsel, and obtaining an extension of time for the payment thereof.

At the June term of the court to which the notice was returnable, it was found that, in consequence of a defect in the return of service, it could not be docketed, but this was waived by counsel for the defendant, and the notice was docketed by consent. At that time defendant's counsel had not determined whether they would defend the proceeding by motion, or apply for an injunction, and asked for a continuance. The motion for a continuance was resisted by counsel for the plaintiff, but was granted by the court, and the cause continued to the September term. In the order of continuance leave was given to the defendant to demur or plead at any time during the then term of the court. The defendant did not demur or plead during the June term, though the court continued in session for some days after the order was entered. When the docket was called on the first day of the September term, counsel for the de-

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fendant stated in open court that unless a compromise of the case could be effected between that date and the date set for the trial, they would apply for an injunction to restrain the prosecution of the action at law. When the case was called for trial at the September term, the defendant tendered his demurrer to the notice, a plea of *nil debet*, and a special plea setting up the defense that the supposed contract was not to be performed within one year and was not in writing, and hence could not be enforced. The plaintiff objected to the reception of the demurrer and pleas on the ground that the time limit prescribed by the order of the June term had expired and it was now too late to file them. The defendant, however, insisted that he had the right to demur and plead as a matter of right, notwithstanding the order at the June term, and offered to lay the case over until a later day of the term, or continue it until the next term, if the plaintiff so desired. The plaintiff insisted on an immediate trial and the rejection of defendant's demurrer and pleas, and the court so ordered. This action of the court constitutes the first assignment of error by the plaintiff in error.

A very large discretion is vested in the trial courts in the matter of the time for filing pleadings and otherwise preparing a case for hearing, and when not controlled by statute, as for example under section 3288 of the Code, their action will not be set aside unless plainly erroneous. This discretion is necessary to the orderly conduct of the business of the court, and unless properly exercised would lead to unnecessary delay and confusion. Usually the proper time for a defendant to tender his defense is when the case is called on the docket, if he has not previously done so, and if, as in the instant case, he desires a continuance, he must not only show cause for it, but the court usually requires, as a part of the price for the continuance, that he shall make up the issue, so that there may not be further cause for

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delay when the case is again called for trial. Of course, if good cause can be shown why the issue cannot or should not then be made up, that too will be continued. But the general rule is to require the issue to be made up before the continuance is granted, and the rule is a wise one. It is not uncommon, however, for the court to grant the continuance, and, in the order granting it, to prescribe a time within which the defendant shall file his pleadings, and this is not objectionable, as it gives counsel additional time within which to prepare the pleadings, and, at the same time, by requiring the issues to be made up in advance, obviates the danger of a continuance when the case is next called for hearing.

In *Va. Fire & M. Ins. Co.* v. *Buck & Newsom,* 88 Va. 517, 518, 13 S. E. 973, it is said: "Issue was joined on the plea of *non assumpsit,* and the defendant company, in accordance with a practice common in the circuit courts of this State, obtained leave to file special pleas within sixty days. The effect of granting leave to file these pleas in the clerk's office was twofold: It gives the defendant additional time within which to plead, and it gives the plaintiff timely notice of the defense to be set up, and thus prevents surprise and delay at the succeeding terms. In these respects the practice is convenient."

But when such time limit has beeen prescribed, the defendant who has not complied with the order has not "the right to demur or plead as a matter of right," but must show good cause why he has not complied with the order of the court, and if he fails to do so, it may exclude his pleadings.

After defendant's demurrer and pleas had been rejected, he then moved the court to dismiss the proceeding because a court of law was without jurisdiction in cases of that kind. In other words, the ground of the motion was because the court had no jurisdiction of the subject matter. The motion

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was a proper one, and the court rightly entertained it. "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court and is to be sought for in the general nature of its powers, or in authority specially conferred." *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931. If not fixed by the Constitution, the legislature alone can determine of what subjects the several courts of the State shall have jurisdiction. No consent of parties can confer it, and a judgment outside of the jurisdiction so conferred is simply void. Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court, and if not brought to the attention of the trial court, it may be taken notice of by the appellate court, *ex mero motu,* for the first time. *South & W. R. Co.* v. *Smith,* 104 Va. 314, 51 S. E. 824; *Hanger* v. *Commonwealth,* 107 Va. 872, 60 S. E. 67. If the court had no jurisdiction of the subject matter, then the motion should have been sustained and the proceeding dismissed. As the defendant did not sign the deed in which the payment of the notes was expressly assumed, but simply accepted it, his contract to pay was not a specialty, but a simple contract debt. *Taylor* v. *Forbes,* 101 Va. 568, 44 S. E. 888; *Willard* v. *Wood,* 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531.

The question, therefore, presented for consideration is this: If the defendant, as a part of the consideration for the purchase of the real estate from Portlock, agreed by parol to pay to the plaintiff Portlock's notes to him, secured by a deed of trust on the land sold, can the plaintiff sue the defendant at law on that promise to recover the deficiency claimed in the notice? The objection, of course, is the want of privity of contract between the plaintiff and the defend-

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ant. This is a question upon which there is great conflict of authority. Many of the cases are collected in 20 Am. & Eng. Ency. L. (2d ed.) 990-991.

The common law did not recognize merely equitable claims or interests, but the general rule was that every action must be brought in the name of the person whose *legal* right was invaded. When applied to matters of contract, the general rule was that, whether the contract was express or implied, by parol or under seal, or of record, the action must be brought in the name of the party in whom the legal interest was vested, and that this legal interest was vested in the person to whom the promise was made, and consequently that he or his privy was the only person who could sue in a court of law upon such contract. 1 Chitty Pl. (5th Am. ed.) 2-5; 15 Ency. Pl., 484, 499, and cases. But some exceptions to this general rule were recognized at an early day, and others have been made since. "Thus, in contracts *not under seal,* it has been held, for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B $1,000, B may in his own name maintain an action against A. But where the promise is *under the seal of the promisor,* the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representative, and not by any one *for whose benefit,* ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes.* Thus, if in a deed indented, 'between A of the first part and Z of the second part,' there be contained a stipulation that Z should pay C $1,000, C can maintain no action for the money; and even if it be a *deed poll,* the better opinion is that at common law no action is maintainable by C." 4 Minor's Inst. 450-1. The last proposition, however, may be well doubted. *Newberry Land Co.* v. *Newberry,* 95 Va. 120, 27 S. E. 899.

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In 1 Chitty Pl., *supra*, it is further said: "When a bond or charter-party is made to A to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A, and the third person cannot sue for or even release the demand. And when a deed is made *inter partes*, (*i. e.*, between A of the first part and B of the second part), C, a stranger, cannot sue either in debt or covenant on a covenant therein, though made for his benefit; but when the deed is not *inter partes* and reciprocal, a stranger may sue whether it be indented or not, provided he have a legal and not a mere beneficial interest. And upon a single bond or deed poll, reciting that the obligor had received of A £40 for the use of C and D, equally to be divided, to be repaid at such a time as should be thought best for the profit of C and D, it was decided that C and D might maintain separate actions for their respective moieties. And when a contract not under seal is made with A to pay B a sum of money, A or B may sustain an action in his own name; if, however, the promise had been to A to pay him for the use of B, A is a trustee, and B having no legal interest, cannot sue. But in some cases where a person has made a contract for the benefit of another, the latter may afterwards adopt it, and sue thereon."

Substantially the same language is used and the same cases cited in 2 Tuck. Com. 209.

The reason for the distinction between deeds *inter partes* and deeds poll is thus set out by Staples, J., in *Jones* v. *Thomas*, 21 Gratt. (62 Va.) 96, 98: "The distinction is founded on the difference in the form and qualities of the respective instruments. A deed *inter partes* is an agreement under seal between two or more persons executing the same, and entering into reciprocal obligations with each other. It is a solemn declaration that all the covenants comprised in the instrument are intended to be made between these parties and none others. A deed poll on the other

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hand, is the act of a single party, and is in the nature of a declaration made by him of his intentions or obligations to some other person."

In the last mentioned case it is further said: "In actions upon parol contracts, the rule is well established, that the party may sue thereon with whom the contract is made, or who is beneficially interested in it. When a promise is made to a person indebted to another, to pay the debt to the creditor, and the latter is a stranger to the contract and to the consideration, the party to whom the promise is made alone has the right of action thereon. A modification of this rule is to be found in a class of cases which hold that where the debtor places money or property in the hands of a third person as a fund from which the creditor is to be paid, the latter may maintain an action against the holder of the fund. In such case a trust is created, and a promise inferred on the part of the holder, from his acceptance of the fund without objection, to pay the creditor. *Ross* v. *Milne*, 12 Leigh (39 Va.) 204 [37 Am. Dec. 646], *Arnold* v. *Lyman*, 17 Mass. R. 400, 575 [9 Am. Dec. 154]: and cases cited in 3 Rob. Prac. 18 and 19.

"In actions upon sealed instruments different principles apply. When a debt exists from one person to another and an obligation or bond is given to the debtor to discharge such debt, he alone can maintain an action for the breach of such obligation. In *McAlister* v. *Marbury*, 4 Humph. R. 426, A bound himself by covenant to pay for B certain debts due by B to C. C instituted an action of covenant against A on the instrument. It was held that he had no legal interest therein, and that an action in his name would not lie. It is laid down in 2 Tucker's Com. 209, and the proposition is sustained by numerous authorities there cited, that when a covenant is made with A to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A; and the third person cannot even

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release the demand. See also, *Millard* v. *Baldwin,* 3 Gray's R. 484; *Watson* v. *Inh. of Cambridge,* 15 Mass. R. 286; 3 Rob. Prac. 15."

Such was the state of the law at the time of the revision of the general statutes of the State in 1849. The revisors, in their report to the legislature, reported a new section in the following words, to-wit: "An immediate estate or interest in, and the benefit of a condition or covenant respecting any estate, real or personal, may be taken by a person, although he be not named a party to the instrument." Report of Revisors, Ch. 116, sec. 2, p. 601. To this the legislature added: "and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Code 1849, Ch. 116, sec. 2. But few cases originating under this statute have come to this court, and it has not been necessary to decide how far the statute is merely declaratory of existing law and how far it changed the common law rules above mentioned, nor is it necessary now to decide that question. It seems plain, however, that the statute applies as well to *promises* (though not under seal) as to *covenants,* and that in either case, to entitle a third person to sue thereon, the promise or covenant must have been made for his *sole* benefit. In the instant case the promise was not under seal. Thacker, by accepting the deed containing the express promise, agreed with Portlock to assume as a part of the purchase price, and pay to the defendant in error, the amount of debt due by Portlock to the defendant in error, and secured by a deed of trust given by Portlock on the property conveyed by the latter to Thacker. In other words, Thacker agreed with Portlock to pay off and discharge the mortgage debt of Port-

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lock to Hubard and Appleby, Inc., and the question is: Was this agreement on the part of Thacker a promise for the *sole benefit* of Hubard & Appleby, Inc.? The answer would seem to be manifest. In *Simpson* v. *Brown*, 68 N. Y. 355, it is said: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither a privy to the contract nor to the consideration. The contract must be made for his benefit *as its object* and he must be the party intended to be benefited." Where the contract was entered into primarily for the benefit of the parties thereto, the mere fact that a third person would incidentally derive a benefit from its performance does not entitle him to sue for a breach thereof. *Stuart* v. *James River & K. C. Co.*, 24 Gratt. (65 Va.) 295; *McIlvaine* v. *Big Stony L. Co.*, 105 Va. 613, 620, 54 S. E. 473; *Lake Ontario Shore R. Co.* v. *Curtiss*, 80 N. Y. 219; *Kountz* v. *Holthouse*, 85 Pa. 235; *Wright* v. *Terry*, 23 Fla. 160, 2 So. 6; Pollock on Contracts (Williston), pp. 244, 256.

We might perhaps safely rest the decision of this case upon this construction of our statute, but, even independent of the statute, or treating it as merely declaratory of the existing law as to parol contracts, as probably intended, the defendant in error cannot maintain an action at law against the plaintiff in error, on the assumption of the payment of its debt, though it had a full and complete remedy in equity. In *National Bank* v. *Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75, it was held that a contract by which the Grand Lodge, for a consideration moving from another corporation, agreed with it to assume the payment of its bonds, would not support an action against the Grand Lodge by a holder of such bonds; and Mr. Justice Strong, delivering the judgment, after observing that the contract was made between and for the benefit of the two corporations, that the holders of the bonds were not parties to it, and that there was no

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privity between them and the Grand Lodge, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt, the general rule is, that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required."

This case was cited with approval in *Keller* v. *Ashford*, 133 U. S. 610, 620, 10 Sup. Ct. 494, 496 (33 L. Ed. 667), a case very similar to the instant case, in which it was said, amongst other things: "Upon the question whether the mortgagee could sue at law, there is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not."

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The ground of the refusal of a right of action at law is the want of privity of contract, but even "in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee."

Of course, no agreement between the mortgagor and his grantee that the latter shall assume the mortgage debt, can change the relations of the mortgagor and mortgagee, and require the latter to treat the mortgagor as a mere surety for the debt, without the assent of the mortgagee (*Shepherd* v. *May*, 115 U. S. 505, 511, 6 Sup. Ct. 119, 29 L. Ed. 456), but when the assent of the mortgagee has been given, equity, by a quasi subrogation, and in order to avoid a multiplicity of suits, gives to the mortgagee the benefit of all the collateral obligations for the payment of the debt which the surety (mortgagor) holds for his indemnity. This right of the mortgagee is not the result of any contract between the grantee with the mortgagee, or with the mortgagor for his benefit, nor of any original equity residing in him. "He is allowed by a rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid a circuity of action, and save the mortgagor, as the intermediate party, from being harrassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which this relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor." *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. (12 C. E. Green), 655, 656; *Keller* v. *Ashford*, 133 U. S. 610, 624-5, 10 Sup. Ct. 494, 33 L. Ed. 667. The same conclusion is reached in an able opinion by Cardwell, J., in *McIlvane* v. *Big Stony L. Co.*, 105 Va. 613, 54 S. E. 473, a case very similar to the instant case, and in which the prior Virginia cases are reviewed and discussed.

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The following cases in this State bearing on this question are given for convenience of reference: *Ross* v. *Milne*, 12 Leigh (39 Va.) 204, 37 Am. Dec. 646; *Vanmeters* v. *Vanmeters*, 3 Gratt. (44 Va.) 148; *Jones* v. *Thomas*, 21 Gratt. (62 Va.) 96; *Stuart* v. *James River & K. C. Co.*, 24 Gratt. (65 Va.) 294; *Willard* v. *Worsham*, 76 Va. 392; *Osborne* v. *Cabell*, 77 Va. 462; *Taliaferro* v. *Day*, 82 Va. 79; *Francisco* v. *Shelton*, 85 Va. 779, 8 S. E. 789; *Tatum* v. *Ballard*, 94 Va. 370, 26 S. E. 871; *Ellett* v. *McGhee*, 94 Va. 377, 26 S. E. 874; *Newberry Land Co.* v. *Newberry*, 95 Va. 120, 27 S. E. 899; *Cosmopolitan Life Ins. Co.* v. *Koegel*, 104 Va. 619, 52 S. E. 166; *Casselman* v. *Gordon*, 118 Va. 553, 88 S. E. 58.

Counsel for the defendant in error insists that the right to maintain this action at law is sustained by *Cosmopolitan Life Ins. Co.* v. *Koegel, supra;* but the facts of that case do not warrant the conclusion. In that case, the Royal Tribe of Joseph, a benefit society without stockholders, desired to go out of business as a separate entity, and to consolidate with the Cosmopolitan Life Insurance Company, and in order to effect this object and fully protect its members, who were entitled to its assets, it entered into an agreement with the insurance company whereby it transferred to that company all of its assets of every kind and its business and good will, and, in consideration of such transfer, the insurance company, among other things, assumed "all liabilities of the said Royal Tribe of Joseph of certificates of membership upon which death had been reported, and which were at the date of said contract unpaid." At the date of the contract, the death of Doegel, a member of the Royal Tribe of Joseph, had been reported and the policy on his life remained unpaid. An action was brought by the beneficiary against the insurance company, and the defense of want of privity was set up by the company, but the plaintiff recovered judgment for the amount of the

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policy in the trial court, and that judgment was affirmed by this court. Upon this point, Cardwell, J., delivering the opinion of the court, said: "But the defendant insists that as the plaintiff is a stranger to the consideration for which that promise and agreement was made, she cannot maintain this action, and that it could be maintained by the Royal Tribe of Joseph alone—this upon the theory that there must be a privity between the plaintiff and defendant in order to render the defendant liable to an action by the plaintiff on the contract. This is undoubtedly the general rule; but it has its exceptions like many other general rules."

He then proceeds to discuss the subject, and distinctly places the right of recovery on the ground of the well established exception to the general rule, that wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. This exception is of long standing and is as well established as the rule itself.

In the *Koegel Case*, Cardwell, J., uses the following language: "In the one class of cases the principle is applied where it is money that the defendant has which equitably belongs to the plaintiff, and in the other where the defendant has either money or property in consideration of which he has promised to pay the debt due the plaintiff by his debtor, from whom the defendant acquired such money or property, and to whom the promise was made, and in either case the law creates the privity and implies the promise necessary to support an action on the part of the plaintiff to recover his debt of the defendant."

The rule and the modification thereof is well stated by Staples, J., in *Jones* v. *Thomas*, 21 Gratt. (62 Va.) 96, 101, hereinbefore quoted.

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In the instant case there was no property or money in the hands of the grantee. The property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency.

The same rule is stated in 15 Ency. Pl. & Pr. 514, citing many cases. See also, *National Bank* v. *Grand Lodge, supra.*

In *Baltimore & Ohio R. Co.* v. *Burke,* 102 Va. 646, 47 S. E. 825; Keith, P., uses this language: "If the defendant has money in his possession which in good conscience he ought to pay to the plaintiff, the law will imply a promise upon the part of the defendant to do his duty, and to pay the money; and this implied promise is as effectual to create privity between the parties as an express promise would be."

On the other hand, it is said that where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach. Where the right of the creditor is derivative only, his remedy is in equity and not at law. *Simson* v. *Brown, supra; Willard* v. *Wood,* 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; *Davis* v. *Calloway,* 30 Ind. 112, 95 Am. Dec. 671; Williston's Contracts, 260; 15 Ency. Pl. & Pr. 516 and cases cited.

Whether or not Thacker was principal or surety for the debt, and, if surety only, whether he was released by giving time to the principal without his consent, cannot be considered. This was a motion to dismiss for want of jurisdiction of the subject matter, and matters affecting the merits of the case cannot be considered.

We are of opinion that a court of law is without jurisdiction in the premises, and for that reason the judgment of the circuit court must be reversed, but without prejudice to the appellee to assert any claim it may have in a court of equity.

Reversed.

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Syllabus.

Richmond.

WASHINGTON AND OLD DOMINION RAILWAY v. ROYSTER GUANO COMPANY.

January 24, 1918.

Absent, Prentis, J.

1. RAILROADS—*Spur Track—Corporation Commission—Pleading.*—A petition was filed before the State Corporation Commission to compel the extension by the defendant railroad of an industrial spur track, which was originally constructed upon its right of way, but the extreme end of which, built on a wooden trestle, had been destroyed by fire and never rebuilt. It appeared from the evidence that the general public would be interested in the spur track, and that the track when constructed would not constitute merely a private switching facility for the sole benefit of the petitioner. The railroad had distinctly declined the offer made by the petitioner to bear the expense, and had refused to build the track upon any terms whatever. The prayer of the petition was that the railroad be required to extend and operate the siding, or that the petitioner be allowed to construct it and the railroad required to operate it.

   Held: That the order of the Commission requiring the work to be done entirely at the expense of the railroad, did not go outside of the issue as made up between the parties, even if it is conceded that the Commission, in proceedings of this character, can be held to strict rules of pleading as to the scope of the orders made by it.

2. RAILROADS — *Spur Track — Corporation Commission — Interstate Commerce.*—Under the above state of facts, the railroad interposed the defense that the Commission had no jurisdiction because the shipments proposed by the petitioner were interstate commerce. As, however, it appeared that the spur track facility was used indiscriminately by the company both for interstate and intrastate commerce and the restoration of the track, instead of constituting a burden upon interstate commerce, would be in aid of interstate commerce, and enable the company to do both classes of business more efficiently, the

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State Corporation Commission had jurisdiction over the complaint. If this defense be valid, then the commission is without jurisdiction to deal with any railway facility located in this State, because practically all railway facilities are used both for interstate and intrastate commerce, just as this industrial spur track is to be used.

3. RAILROADS—*Spur Track—Corporation Commission—Private Benefit.*—The petitioner constitutes a part of the public, and is entitled to facilities equal to those of his competitors in business, and the defendant company has no right to discriminate against its business by refusing to maintain the facility so long as it is needed to enable the defendant properly to discharge its public duties. The land was acquired by the railroad for the very purpose of maintaining this industrial spur track, and the evidence plainly indicated that it was necessary at the time it was constructed, and none the less necessary at this time. In refusing to rebuild and maintain this track in its entirety, the company plainly failed to discharge its duties.

4. RAILROADS — *Spur Track — Corporation Commission — Interstate Commerce.*—The rights of shippers and the duties of the public cannot be determined by the consideration that the revenues derived by the railroad on shipments of interstate commerce were less than those on shipments of intrastate commerce. To admit such a proposition is to admit that the railroad has the right to discriminate against interstate commerce. Therefore, it was no defense in the instant case, that the railroad's freight revenue derived from petitioner's proposed shipments from a point without the State, would be less than if the shipments were transported over its own line from a point within the State.

Appeal from an order of the State Corporation Commission.

Affirmed.

The opinion states the case.

W. J. Lambert and *C. E. Nicol,* for the plaintiff in error.

C. J. Collins, for the defendant in error.

KELLY, J., delivered the opinion of the court.

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The F. S. Royster Guano Company filed its petition before the State Corporation Commission to compel the extension by the Washington and Old Dominion Railway of a certain side-track at Leesburg, Virginia. The Commission entered an order granting the prayer of the petition, and the Railway brings the case here for review. We have maturely considered the record and entertain no doubt as to the propriety or legality of the order.

The case was fully heard upon the petition, the demurrer and answer thereto, the testimony of witnesses, and the arguments and briefs of counsel; and the Commission, after taking the controversy under advisement, announced its decision in a written opinion which satisfactorily discloses the facts, the contentions of the parties, and the reasons and authorities upon which the decision is based. This opinion, prepared by Prentis, chairman, and concurred in by Commissioners Rhea and Wingfield, we shall adopt as the opinion of this court. Counsel for the railway, while still insisting here that the order was erroneous in all respects, further earnestly contend before us that even if the Commission was right in ordering the construction of the side-track, the order improperly went beyond the scope of the pleadings in requiring the work to be done entirely at the expense of the railway, and in directing the extension for a greater distance than was indicated in the petition.

It does appear from the petition and from the evidence that the Guano Company was willing to pay for grading and preparing the roadbed on the right of way, the cost of all necessary materials, and the cost of constructing and maintaining the extension; and it further appears that the literal prayer of the petition was for an extension of a much shorter siding than that which was in terms designated in the order. It is readily manifest, however, upon an examination of the record and of the opinion by the

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Commission, that no error was committed, either in requiring the side-track to be constructed at the railway's expense, or in the specification of the length of that line.

As to the expense of building the siding, the Commission found from the evidence that the general public would be interested therein, and that the track when constructed would not constitute merely a private switching facility for the sole benefit of the Guano Company. The railway had distinctly declined the offer made by the Guano Company to bear the expense, and refused to build the track upon any terms whatever. The prayer of the petition was in the alternative, either (1) that the railway be required to extend and operate the siding, or (2) that the petitioner be allowed to construct it and the railway required to operate it. Therefore, if it were conceded that the Commission, in proceedings of this character, can be held to strict rules of pleading as to the scope of the orders made by it, the order in this case does not go outside of the issue as made up between the parties.

As to the claim of the railway that the Commission directed the construction of a longer line than the Guano Company requested, it is sufficient to say that the order does not in fact do so. The language of the order, construed in the light of the opinion and the evidence, very clearly granted substantially the relief in this respect which had been asked for, and refused by the railway, and which was understood by the parties to be directly in issue at the hearing before the Commission.

The opinion of the Commission, adopted by us, is as follows:

"As we understand the facts in this case, the Washington and Old Dominion Railway, as the lessee of the Southern Railway Company, controls and operates an industrial spur tract at Leesburg, which was originally constructed

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by the lessor upon its right of way which was purchased for that purpose, for a distance of 46 feet, extending from the north side of South street and running thence to the south side of Loudoun (or Market) street, Leesburg.

"Shortly after the Washington and Old Dominion Railway took possession of the property under its lease, the extreme end of this industrial siding, say 150 feet thereof, built on a wooden trestle, was destroyed by fire and has never been rebuilt. Upon this siding there are now located at least six fertilizer warehouses, into which fertilizer which is shipped to Leesburg is unloaded and thence distributed to the local consumers. The track is also used by the defendant company as a public team or delivery track for persons desiring to receive their carload freight therefrom.

"The petitioner, the F. S. Royster Guano Company, a large manufacturer of guano, and proprietor of numerous factories, one of which is located in Baltimore, Maryland, desiring to extend its business, has purchased a piece of land located alongside of the right of way of the industrial spur track referred to, at its extreme end, where the track has, as above stated, been destroyed.

"It has filed its petition and asked that this Commission require the railroad company to rebuild the destroyed portion of the track so that it may transact its fertilizer business at Leesburg in the same way that other fertilizer dealers are transacting business there upon the uninjured portion of that industrial spur track and has offered to pay the entire expense of reconstructing it.

"Both in the petition and in the argument the petitioner has presented the question here involved as if the track, when reconstructed, would be its own private switching facility. This, we think, is a misconception, as will hereafter appear.

"The company has refused to rebuild the track, taking the position that inasmuch as the shipments from Balti-

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more are interstate commerce this Commission has no jurisdiction over the complaint; that the extension would be for the private benefit of the petitioner in response to no public demand; that its freight revenue derived from such shipments would be less than if the fertilizer were transported over its own line from the Alexandria, Virginia, factories to Leesburg, and that the switch would be expensive to operate.

"We think that none of the defenses of the company should be sustained.

"It is perfectly apparent, and not denied, that the Southern Railway Company purchased, and the lessee, the defendant, holds the land, not for the purpose of constructing and operating a private switching facility, but for the purpose of constructing its own industrial spur track primarily for the use of the shippers owning warehouses contiguous thereto, and also for the use of the general public. Hence the burned trestle cannot be deemed to be a private facility. When it was originally constructed it was all operated in the company's interest and in order to enable it to serve the public generally, and if reconstructed it will continue to have this public character.

"First, as to the defense that this Commission has no jurisdiction because the shipments referred to constitute interstate commerce. We would say that the spur track facility is used indiscriminately by the company both for interstate and intrastate commerce, and the restoration of the track, instead of constituting a burden upon interstate commerce would be in aid of interstate commerce, and enable the company to do both classes of business more efficiently. If this defense be valid, then this Commission is without jurisdiction to deal with any railway facility located in this State, because practically all railway facilities are used both for interstate and intrastate commerce, just as this industrial spur track is to be used.

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"Second, as to the claim that the extension is for the petitioner's private benefit and not for the public. We would say that the petitioner constitutes a part of the public, and is entitled to facilities equal to those of his competitors in business, and that the defendant company has no right to discriminate against its business by refusing to maintain the facility which existed at the time it became the lessee of the property so long as it is needed to enable the defendant properly to discharge its public duties. The land was acquired for the very purpose of maintaining this industrial spur track, and the evidence plainly indicates that it was necessary at the time its predecessor in title constructed it, and that it is none the less necessary at Leesburg at this time. In refusing to rebuild and maintain this track in its entirety, the company is plainly failing to discharge the duties which it undertook to perform at the time it leased the property from the Southern Railway Company.

"Third. Equally vain is the defense that the revenues derived by the company are less on shipments of fertilizer from Baltimore, Maryland, than they are on shipments of fertilizer from Alexandria, Virginia. The rights of the shippers and the duties of the public can never be determined by any such consideration. To admit the proposition is to admit that the company has the right to discriminate against interstate commerce.

"Meyer, Commissioner, in *'Railway Rates from Texas, Louisiana and Arkansas to Oklahoma and Missouri,'* 28 Interstate Commerce Commission Reports, page 474, in dealing with a question involving a similar principle, uses this language: 'The broad fundamental question involved in this case is whether the Santa Fe should be permitted to retain for itself the lumber market at points on its line for the benefit of producing points on its line to the exclusion of all others, except under a penalty of 3 1-2c per 100 pounds. We think this is an exercise of a carrier's

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rate-making power far too arbitrary and too selfish to be permitted under the act. As a matter of sound policy under the law a carrier is not justified in attempting to restrict its traffic to movements between points on its own line."

"In *Indianapolis Freight Bureau* v. *C., C., C. & St. L. Ry. Co. and others,* 26 Interstate Commerce Commission Reports, page 58, Harlan, Commissioner, says: 'But we recall no case in which the Commission has recognized the right of a carrier to fix its rates to or from a given point on a higher level than they otherwise should be, in order to prevent one commodity from competing with another, or to keep the products of one community out of a territory; the wants of which may be fully supplied by another community. In our judgment the right to adjust rates on any such theory should not rest either in the carrier or in this Commission. The rails of a common carrier form a public highway over which the commerce of any community should be able freely to move on rates that are reasonable, all things considered, regardless of the consequences of its competition upon any other community.'

"If the rate on fertilizer from Baltimore to Leesburg, $2.00 per net ton, as against $1.10 per net ton from Alexandria, is inadequate, then proper effort should be made to have the rate increased. The defendant cannot lawfully refuse to perform the public service for which it was organized.

"Fourth. We think the claim that to increase the length of the switch 150 feet, so far from making it more expensive to operate, would substantially decrease the expense of operation. The evidence shows that the switch is greatly crowded, and the company itself claims that it is now necessary to move every car several times, and it must be apparent, under the conditions which here appear, that the longer the switch is, the more room there is for pushing

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cars out of the way of those which it is desired to place at warehouses which are nearer to the main line. The evidence plainly shows that when the switch was longer the congestion was less.

"Upon the whole case, we are of opinion that it is the duty of the company to restore that portion of its industrial spur track to the condition in which it was before the track was destroyed, so as to relieve the congestion now existing, as well as for the purpose of affording the petitioner and the general public proper unloading facilities at Leesburg."

Affirmed.

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Richmond.

ABERNATHY v. EMPORIA MANUFACTURING COMPANY.

March 21, 1918.

1. APPEAL AND ERROR—*Record—Certification of Evidence.*—Where the evidence and not the facts are certified, the case stands in the Supreme Court of Appeals as on a demurrer to the evidence by the plaintiff in error.
2. FIRES—*Presumptions and Burden of Proof—Instructions.*—In an action for damages by fire an instruction that the burden is on the plaintiff to show by a preponderance of evidence how and why the fire occurred and to warrant a verdict for the plaintiff the final burden rests upon him to prove by a preponderance of evidence that the origin of said fire was due to the negligence of the defendant, is not erroneous and is not calculated to convey to the jury the idea that the plaintiff is required to prove his case beyond a reasonable doubt. When the instruction is read as a whole, it did no more than tell the jury that the burden was upon the plaintiff, by a preponderance of the evidence, to establish the fact that the fire in question was set out by the defendant, or to trace the origin of the fire to the defendant's agency. The object of the instruction was to tell the jury that they could not guess at the origin of the fire, but that this fact must be established by evidence, and that, in order to fix a liability on the defendant by finding a verdict in his favor against the defendant, the burden was upon the plaintiff to show, by a *preponderance* of the evidence, "that the origin of said fire was due to the negligence of the defendant."
3. INSTRUCTIONS—*Language Used in Opinion.*—Language used by an appellate court in deciding a case may be entirely proper and correctly state the law, and yet be wholly unsuitable as an instruction to the jury, even where the facts of the two cases are similar. The appellate judge frequently uses argumentative language and also freely expresses his opinion upon the facts of the case, neither of which would be appropriate in an instruction to the jury. So that the mere fact that certain language has been used by the judge of the appellate court in

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rendering an opinion is not of itself sufficient to justify the use of the same language by a trial court in its instruction to the jury.

4. FIRES—*Instructions.*—In an action for damages the jury were instructed that if they "believe from the evidence that the fire in question originated on the right of way of the defendant by the emission of sparks or coals of fire, yet if they believe from the evidence that said right of way was reasonably clear of combustible materials liable to ignition, then the defendant is not liable," is erroneous. The instruction should have gone further and said, that if the right of way was reasonably clear of combustible material, and the defendant's locomotives were equipped with the best appliances in known practical use, that they were in good order and carefully operated, then and in that event they should find for the defendant.

5. APPEAL AND ERROR—*Reversible Error—Instruction Cured by Instruction.*—A defect in one instruction is not cured by a correct statement of the law in another, where the appellate court is unable to say that the jury could not have been misled by the defective instruction.

6. INSTRUCTIONS—*Two or More Propositions of Law.*—Two or more correct propositions of law may be stated in the same instruction, if the jury will not be confused thereby.

7. FIRES—*Instructions—Where Fire Might Have Originated from Two Causes.*—In an action for damages by fire the jury were instructed that not "only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the fire may have been started from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the fire was caused by the one as by the other;" that is to say, that if the jury believe that the fire might have been set out by the boys who were smoking cigarettes, as well as by sparks from the engine of the defendant, or if it was just as probable that the fire was caused by the one as by the other, they should find for the defendant.

Held: That, an objection to this instruction that it consisted of many incongruous, unrelated and contradictory propositions bound up together, could not be sustained.

8. INSTRUCTIONS—*Not Based upon the Evidence.*—In an action for damages by fire, where the defendant offered evidence to support its theory that it was not responsible for the origin of the fire, and evidence was introduced to the effect that two boys smoking cigarettes were seen going in the direction in which the fire originated at a propitious time for the fire to have

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been set out through their negligence, the instruction set out in the preceding headnote is not erroneous as taking a partial view of the evidence and as being based upon a mere scintilla of evidence.

9. FIRES—*Evidence—Instructions.*—In an action for damages by fire an instruction was given that unless the jury believe from the evidence "that engine eleven might have caused the fire complained of, they should not consider any evidence relative to fires testified to have been set out by engine eleven nor the evidence relative to what is known as 'second fire,' or the fire west of Woods Camp, unless they believe that the engine that might have caused the fire in question might also have originated that fire." The evidence showed that but two engines, numbers eleven and twelve, had run on the railroad the day of the fire and the evidence for the defendant clearly showed that engine number eleven could not have set out the fire. But there was some evidence on the part of the plaintiff that number eleven as well as number twelve might have set out the fire.

Held: That the instruction was not erroneous as incoherent and as combining two distinct charges with reference to two severable questions which were so inextricably blended as to be utterly misleading and confusing to the jury.

10. FIRES—*Evidence.*—In an action for damages by fire, if the fire could only have been set out by one of two engines and one of these was eliminated entirely, then the evidence relating to fires set out by the eliminated engine was not proper for the consideration of the jury.

11. FIRES—*Instructions—Proof of Negligence—Inference from a Presumption.*—In an action for damages by fire, the court instructed the jury "that in order to warrant a verdict against the defendant, the evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

Held: That, the instruction was not erroneous, while the statement in the instruction, that an inference cannot be drawn from a presumption, but must be founded upon some fact legally established, could not have been very helpful to the jury, yet in view of other instructions given in the case it could not have led them astray.

12. FIRES—*Instructions—Repetition of Instructions.*—There is no error in refusing an instruction where the jury had already been sufficiently instructed on the subject, and almost in the very language of the instruction requested.

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13. FIRES—*Evidence—Condition of Right of Way.*—In an action for damages by fire, the exclusion of testimony offered by the plaintiff, that the defendant's right of way was not clear and free of combustible material at a point a mile from where the fire occurred, was not erroneous, although the officers of defendant testified that the right of way of defendant had been raked and burned shortly before the fire, from which it might naturally be inferred that the entire right of way had been raked and burned shortly before the fire, whereas the testimony of the witness offered showed that it had not been raked and burned throughout its entire length. The evidence offered was immaterial as tending to show what the condition of the track was at the point at which the fire originated.

14. FIRES—*Evidence of Other Fires.*—In the instant case, at least one witness for the plaintiff testified that engine number eleven as well as engine number twelve had passed the place where the fire originated shortly before it broke out. It was, therefore, competent for the plaintiff to show the bad condition of engine number eleven soon after the fire, and the exclusion of evidence that engine number eleven had been seen to set out a fire shortly after the fire in question was erroneous.

15. WITNESSES — *Impeachment — Inconsistent Statements.*—It was error to admit evidence of a prior consistent statement of a witness who had testified to a materal fact in the case, where it was not shown whether the contradictory statement of the witness was made before or after the consistent statement, nor was the date fixed when the witness was alleged to have offered to sell his testimony to the plaintiff. The testimony in the instant case does not bring the statement within the rule which permits evidence of a prior consistent statement before the time when the supposed bias or corruption could have existed, in order to repel the presumption that the present testimony was attributable to such bias or corruption.

16. WITNESSES—*Examination of Witnesses—Leading Question—Appeal and Error—Reversible Error.*—Great latitude is allowed trial courts in the matter of the examination of witnesses and their rulings thereon will not be reversed unless clearly prejudicial to the party excepting. Ordinarily, permitting a leading question to be asked is no ground for reversal.

17. APPEAL AND ERROR—*Harmless Error—Conduct of Counsel.*—In cross-examining a witness defendant's counsel said: "I know, Mr. Turner, this situation myself, and there are others who know it, and I want to ask you to see if we coincide."

Held: That, this could not have prejudiced the plaintiff.

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18. JURY—*View by Jury—Discretion of Court.*—The question of the propriety of ordering a view lies largely in the discretion of the trial court, which should only grant it when it is reasonably certain that it will be of substantial aid to the jury in reaching a correct verdict, and whose decision will not be reversed unless the record shows that a view was necessary to a just decision.

19. JURY—*View by Jury—Discretion of Court*—In the instant case, there was no controversy as to the location of the road, and the general conditions surrounding it, and there was no necessity for a view in order to assist the jury in understanding the testimony. The testimony in connection with a plat used on the trial would seem to have been clear enough without the necessity for a view. In addition to this, it appears that delay in the trial would have been caused by ordering a view, and that the plaintiff had not made any provision to take the jury to the scene of the fire.

Held: That, the trial court did not err in refusing to order a view.

Error to a judgment of the Circuit Court of Lunenburg County, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Buford & Peterson, for the plaintiff in error.

Irby Turnbull and *Hiram Wall*, for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is an action brought by the plaintiff in error to recover the value of a large quantity of lumber destroyed by fire, which was alleged to have been set out by the engine of defendant in error. The defendant in error operates a lumber manufacturing plant. It owns a considerable amount of timber in the county of Lunenburg, and in con-

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nection with its enterprise is engaged in hauling logs from the woods to its sawmill. Its transportation system consists of a logging railroad, over which it operates regular trains from its principal camp in Lunenburg to a junction point called South Hill, on the Southern Railway. The logging road is a railroad of inferior character, and over it there are used regularly two engines to pull its trains.

On April 27, 1915, a fire broke out on or near its railway track, which was communicated to the plaintiff's lumber and destroyed it. The defendant's contention is that the fire was not set out by its engines. There was a verdict and judgment for the defendant, to which judgment this writ of error was awarded.

The first error assigned is that the verdict was contrary to the law and the evidence. The evidence and not the facts being certified, the case stands in this court as on a demurrer to the evidence by the plaintiff in error. Code, sec. 3454.

The theory of the defendant was and is that the fire was not set out by its engines, and, viewed as on a demurrer to the evidence by the plaintiff in error, the evidence to support the verdict is so abundant that it is deemed unnecessary to recite it here. Some of it is hereinafter given in the discussion of the fourth assignment of error.

The second assignment of error is to the action of the trial court in giving the following instruction:

"The court instructs the jury that the burden is on the plaintiff to show by a preponderance of evidence how and why the fire occurred and to warrant a verdict for the plaintiff the final burden rests upon him to prove by a preponderance of evidence that the origin of said fire was due to the negligence of the defendant."

The chief objection urged to this instruction is to the use of the expression "how and why," and it is said that the repeated reiteration of the duty of the plaintiff was calculated

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to convey to the jury the idea that the plaintiff was required to prove his case beyond a reasonable doubt. We cannot concur in this conclusion. It cannot be doubted that the burden was upon the plaintiff to offer evidence to prove the origin of the fire, also to show by a preponderance of the evidence that the defendant was responsible therefor. This, the first part of the instruction assumed to do. The instruction then, as if by way of explanation of what had been stated, proceeds, "and to warrant a verdict for the plaintiff the final burden rests upon him to prove by a preponderance of evidence that the origin of said fire was due to the negligence of the defendant." Certainly no objection can be found to this part of the instruction, and, when the instruction is read as a whole, it did no more than tell the jury that the burden was upon the plaintiff, by a preponderance of the evidence, to establish the fact that the fire in question was set out by the defendant, or to trace the origin of the fire to the defendant's agency. The object of the instruction was to tell the jury that they could not guess at the origin of the fire, but that this fact must be established by evidence, and that, in order to fix a liability on the defendant by finding a verdict in his favor against the defendant, the burden was upon the plaintiff to show, by a *preponderance* of the evidence, "that the origin of said fire was due to the negligence of the defendant." The instruction might have been framed in language more apt to express this idea, but, under the facts of this case, we do not see how the jury could have been misled by it. The law on this subject has been frequently stated by this court. *C. & O. Ry. Co.* v. *Sparrow*, 98 Va. 63, 37 S. E. 302; *N. & W. Ry. Co.* v. *Cromer*, 99 Va. 763; 40 S. E. 54; *Southern Ry. Co.* v. *Hall*, 102 Va. 135, 45 S. E. 867; *C. & O. Ry. Co.* v. *Heath*, 103 Va. 64, 48 S. E. 508; *A. C. L. R. Co.* v. *Watkins*, 104 Va. 154, 51 S. E. 172.

We base our conclusion, as to this instruction, on the language of the instruction, read in connection with the evi-

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dence in this case, and not on the fact that the same language has been used in opinions of this court in another case, or cases. Language used by an appellate court in deciding a case may be entirely proper and correctly state the law, and yet be wholly unsuitable as an instruction to the jury, even where the facts of the two cases are similar. The appellate judge frequently uses argumentative language and also freely expresses his opinion upon the facts of the cases, neither of which would be appropriate in an instruction to the jury. So that the mere fact that certain language has been used by the judge of the appellate court in rendering an opinion is not of itself sufficient to justify the use of the same language by a trial court in its instruction to the jury. *Atlanta & W. P. R. Co.* v. *Hudson*, 123 Ga. 108, 51 S. E. 29; *Farrall* v. *Farnam* (Md.), 5 Atl. 622.

The third error assigned is to the action of the trial court in giving to the jury the following instruction:

"The court instructs the jury that even if they believe from the evidence that the fire in question originated on the right of way of the defendant by the emission of sparks or coals of fire, yet if they believe from the evidence that said right of way was reasonably clear of combustible materials liable to ignition, then the defendant is not liable."

The plaintiff in his declaration presented two aspects of the case, one that the fire started on the right of way, which was foul, and the other that on account of the negligent construction and operation of its trains sparks were cast beyond its right of way and set out the fire in question. The instruction was addressed to the first aspect of the plaintiff's case as stated in the declaration, and although it concludes with the statement, that if they believe the hypothesis stated in the instruction the defendant is not liable, these words were equivalent to directing the jury to find for the defendant. If the jury took this view of the case, and the instruction was otherwise correct, there was no error in di-

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recting a finding for the defendant. The fire could not have originated both on and off the right of way. The declaration, in separate counts, propounded both theories, and the plaintiff has no ground of complaint if the jury adopted one of the theories and rejected the other. The instruction tells the jury, if they adopt the theory that the fire originated on the defendant's right of way, still they must find for the defendant if they believe the right of way was reasonably free from combustible material. This was not taking a partial view of the case, but defined the rights of the parties in the event the jury should adopt that theory of the case. But even in this aspect of the case, the instruction to the jury was too limited in its scope and effect. The right of way of the defendant may have been reasonably clear of combustible material liable to ignition, and yet if the defendant, by reason of defective locomotives, or by the improper operation of the locomotives, scattered fire along the right of way, which was communicated to the property of the plaintiff, the plaintiff would be entitled to recover, although its right of way was reasonably clear of combustible material. The defendant could not have been allowed, simply by keeping its right of way reasonably clear of combustible material, to scatter fire along its right of way which would cause damage to others. The instruction, in this respect, should have gone further and said, that if the right of way was reasonably clear of combustible material, and the defendant's locomotives were equipped with the best appliances in known practical use, that they were in good order and carefully operated, then and in that event they should find for the defendant. The law was correctly stated in another instruction given at the instance of the defendant, hereinafter quoted in the discussion of the eighth assignment of error, but we are unable to say that the jury could not have been misled by the material omission aforesaid from this instruction, which purported to state the law ap-

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plicable where the fire started on defendant's right of way, and when this is the case the defect in one instruction is not cured by a correct statement of the law in another. The instruction, as given, was erroneous. *American L. Co.* v. *Whitlock,* 109 Va. 238, 63 S. E. 991.

The fourth assignment of error is to the action of the trial court in giving the following instruction:

"The jury are instructed that not only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the fire may have been started from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the fire was caused by the one as by the other; that is to say, if the jury believe from the evidence that the said fire might have been set out by the boys who were smoking cigarettes, who had passed along where the fire originated, if they believe from the evidence that the boys said to have passed did so pass and if they further believe from the evidence that the boys were smoking, as well as by sparks from the engine of the defendant; or if it was just as probable that the fire was caused by the one as by the other, they should find for the defendant."

The objection made to this instruction is that it consists of many incongruous, unrelated and contradictory propositions bound up together. It is also insisted that the instruction is erroneous because it takes a partial view of the evidence, and because in some respects based upon a mere scintilla of evidence. We do not think the instruction is amenable to the objections that are made to it. The propositions that are inserted in the instruction have been laid down by numerous decisions of this court. *A. C. L. R. Co.* v. *Watkins, supra; C. & O. Ry. Co.* v. *Heath, supra,* and cases cited. It is true that probably all of the propositions stated in the instruction have not been announced in a single case, but

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there is no reason why two or more correct propositions of law may not be stated in the same instruction, if the jury will not be confused thereby. Nor do we think that any portion of the instruction is based upon a mere scintilla of evidence. The theory of the defendant was that the fire was set out by some agency other than the defendant. This theory was supported by testimony introduced to the effect that two boys smoking cigarettes were seen going in the direction in which the fire originated at a propitious time for it to have been set out through their negligence. It is true that this testimony was vigorously assailed, but there was other testimony in the case tending to support the theory of the defendant that the fire was not set out through its agency. The engineer who operated the only engine which in the defendant's view could have set out the fire testified that he saw the fire burning as he approached the spot where the defendant claims it originated. The defendant's foreman also testified that he saw the boys and talked with them shortly before the fire started. The defendant also offered testimony to show that the wind was blowing hard in the opposite direction from the point at which the defendant alleges that the fire started and that the fire actually started nearly 100 yards from its right of way at such point. All of this evidence tended to support the theory of the defendant that it was not responsible for the origin of the fire.

The fifth assignment of error is to the action of the court in giving the following instruction:

"The court instructs the jury that, unless they believe from the evidence that engine eleven might have caused the fire complained of, they should not consider any evidence relative to fires testified to have been set out by engine eleven nor the evidence relative to what is known as the 'second fire,' or the fire west of Woods Camp, unless they believe that the engine that might have caused the fire in question might also have originated that fire."

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The objection made to this instruction is that it is incoherent, and that according to the defendant's explanation of it, "it combines two distinct charges with reference to two severable questions which are so inextricably blended as to be utterly misleading and confusing to the jury." We do not think that the instruction is amenable to the objection made. The evidence shows that there were but two engines that operated regularly on this road, and only two had run on it that day. The evidence for the defendant clearly showed that engine No. 12 was the only engine which could have set out the fire, and that engine No. 11 had not been along that part of the track since nine o'clock in the morning. There was some evidence, however, on the part of the plaintiff that engine No. 11 as well as engine No. 12 had passed over the track at an opportune time to have started the fire in question. It was to meet this condition of affairs that this instruction was asked. The fire, if set out by one of the defendant's engines, could only have been set out, according to the testimony, by engine No. 11 or engine No. 12. The defendant was satisfied that the evidence on behalf of the plaintiff was insufficient to show that engine No. 11 was at all concerned in the fire, and hence asked the court to give the instruction above mentioned; and clearly, if the jury believed that the fire in controversy had not been set out by engine No. 11, and that the engine which might have caused the fire in question might also have originated the second fire, then the instruction was proper. If the fire could only have been set out by one of two engines and one of these was eliminated entirely, then the evidence relating to fires set out by the eliminated engine was not proper for the consideration of the jury.

The elimination of the connection of engine No. 11 with the fire in controversy, in effect identified engine No. 12 as the only engine of the defendant which could have set out the fire in question, and if engine No. 12 was identified as

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the only one that could have set the fire out, it was proper for the court to exclude from the consideration of the jury all evidence of fires set out by the other engine. *N. & W. Ry. Co.* v. *Briggs,* 103 Va. 105, 48 S. E. 521, and cases cited.

The sixth asignment of error is to the action of the court in giving to the jury the following instruction:

"The court instructs the jury that in order to warrant a verdict against the defendant, the evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

This instruction is in language which has been repeatedly used in the opinions of this court. *N. & W. Ry. Co.* v. *Cromer, supra; Southern Ry. Co.* v. *Hall, supra; C. & O. Ry. Co.* v. *Heath, supra; N. & W. Ry. Co.* v. *Briggs, supra.* While we do not think that the statement in the instruction, that an inference cannot be drawn from a presumption, but must be founded upon some fact legally established, could have been very helpful to the jury, we feel equally sure that in view of other instructions given in the case it could not have led them astray. In this connection see *C. & O. Ry. Co.* v. *Ware,* 122 Va. 246, 95 S. E. 183.

The seventh assignment of error was withdrawn.

The eighth assignment of error was to the refusal of the court to give the following instruction offered by the plaintiff:

"The court instructs the jury that if they believe from the evidence that the fire which consumed the lumber of the said C. P. Abernathy originated from sparks or cinders emitted by one of the engines of the defendant, then the said defendant is presumptively guilty of negligence; and that, while the law recognizes the fact that the skilful do not agree in the matter of instrumentalities and allows to any one using mechanical devices the freedom of action and judgment which must be incident to such difference in judgment

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and accordingly does not permit the jury to condemn a device merely because some other person using a similar device prefers a different pattern, yet under the circumstances aforesaid, the burden is upon the defendant to prove that its said engine was equipped with the best mechanical appliances in known and practical use for preventing the escape of sparks and cinders; that it was kept in such proper condition and repair, and that it was managed and operated with such proper care and prudence as reasonably to prevent the escape of sparks and cinders and the communication of fire to the property of the said C. P. Abernathy, the plaintiff in this action."

The jury had already been sufficiently instructed on this subject, and almost in the very language of the instruction requested, and there was no error in refusing it. The instruction was fully covered by the following instructions, the first of which was given at the instance of the plaintiff, and the second at the instance of the defendant:

"The court instructs the jury that if they believe from the evidence that the fire which consumed the lumber of the plaintiff originated from sparks or cinders emitted by one of the engines of the defendant, then the said defendant is presumptively guilty of negligence."

"The court instructs the jury that if they believe from the evidence that the defendant's engine, which is alleged to have started the fire that destroyed the plaintiff's lumber, was equipped with as good a spark arrester and ash pan as is known in practical use; that such spark arrester and ash pan were in good repair, and that said engine was operated by a skilful engineer, with ordinary care, and that the right of way was reasonably clear of combustible matter, liable to ignition, they must find for the defendant, although they may also believe from the evidence that the defendant's engine set out the fire in question."

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The ninth assignment of error relates to the exclusion of testimony offered by the plaintiff, that the defendant's right of way was not clear and free of combustible material at a point a mile from where the fire occurred. It is true that the evidence had been offered by the president and superintendent of the defendant company that the right of way of the defendant had been raked and burned shortly before the fire. The material point at issue was whether or not the right of way was foul at the point where the fire occurred. Upon this point the witness was asked to state if he knew what was the condition of the right of way where the fire started, and he answered, "I couldn't tell you because I don't know the conditions." He was then asked how far from the place where the fire was said to have originated was the portion of the track with which he was familiar, and he answered that it was a mile from the fire. We think there was no error in excluding this testimony. While the natural inference from the testimony of the defendant's witnesses is that the entire right of way had been raked and burned shortly before the fire, and the testimony of the witness offered showed that it had not been raked and burned throughout its entire length, it was really immaterial as tending to show what the condition of the track was at the point at which the fire originated, and the testimony offered is of too doubtful a character to be of value to the jury in arriving at a proper conclusion as to what was the condition of the track at the point of the fire.

The tenth assignment of error relates to the refusal to allow the plaintiff to show that in the latter part of May, 1915, engine No. 11 had been seen by him to set out fire. At least one witness for the plaintiff had testified that engine No. 11 as well as No. 12 had passed the place where the fire originated shortly before it broke out and it was competent, therefore, for the plaintiff to show the bad condition of engine No. 11 soon after the fire, as it would have a tendency

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to show that it was in bad condition on the day of the fire, and if the jury believed that engine No. 11 might have set out the fire, it was competent to show its bad condition. The exclusion of this evidence we think was error.

The eleventh assignment of error was to the admission of testimony showing a prior consistent statement of a witness who had testified to a material fact in the case. Counsel for the plaintiff conferred with the witness, Lee Owen, who lived close to the point of origin of the fire, with reference to what he knew about it, and in answer to their interrogatories he had told them he had not seen anybody in that section who could have set out the fire, on that day. When put on the stand to testify for the plaintiff, he testified that two boys had been at his house about half an hour before the fire, and that they left his house, smoking cigarettes, going along the path in the direction in which the fire originated, and that they said they were looking for a job. This testimony took the plaintiff by surprise. Counsel for the plaintiff, treating the witness as adverse, examined him at great length on this subject, and among other things asked him if he had not offered to sell his testimony to the plaintiff's brother for $140. They also proved by the plaintiff's brother that Owen had, in effect, made such offer. After this evidence had been introduced, the defendant put a witness on the stand to prove that Owen had stated to the witness the same facts that he had testified to on the stand about seeing the two boys leave his house smoking cigarettes. The plaintiff objected to the reception of this testimony, but the court overruled the objection, and allowed the testimony to be received.

This action was brought to the first September rules, 1915, and the trial took place at the March term, 1916. It sufficiently appears that the prior consistent statement offered in evidence was made in October or November, 1915, after this action was brought. The date of the inconsistent

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statement is not fixed, but it was at least two or three months before the trial. Whether it was before or after the consistent statement cannot be definitely fixed by the record, nor is the date fixed when the witness is alleged to have offered to sell his testimony to the plaintiff. Under such circumstances, the testimony as to the supposed prior consistent statement was plainly inadmissible, and it was error to receive it. The testimony in this case does not bring it within the rule which permits evidence of a prior consistent statement before the time when the supposed bias or corruption could have existed, in order to repel the presumption that the present testimony was attributable to such bias or corruption. *Repass* v. *Richmond,* 99 Va. 508, 39 S. E. 160; 1 Gr. Ev. (16 ed.) sec. 469-b.

The twelfth assignment of error is to the action of the court in allowing the engineer who operated engine No. 12 on that day to answer a question propounded to him by counsel for the defendant. The question and answer were as follows: "Were you careful in the operation of your engine?" and he answered, "Yes, sir."

Objection was made to this question in the trial court, on the ground that it was leading. In this court it is insisted that the question called for an expression of opinion by one who was not expert, and had not been shown to be qualified to give expert testimony. The question was plainly leading, and the witness should not have been permitted to answer it, but this did not constitute reversible error. It had already been shown by another witness that Burton, the witness under examination, was an engineer of experience, and was "a very good geared locomotive engineer—one of the best we have, and the most careful engineer we have." Great latitude is allowed in trial courts in the matter of the examination of witnesses and their rulings thereon will not be reversed unless clearly prejudicial to the party ex-

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cepting. Ordinarily, permitting a leading question to be asked is no ground for reversal. *Smith* v. *Stanley*, 114 Va. 119, 125, 75 S. E. 742.

Whether or not we should consider the objection raised for the first time in this court, that the question called for the expression of an opinion by a non-expert witness, need not be considered, as the judgment has to be reversed on other grounds, and the question will not probably arise on another trial.

The thirteenth assignment of error relates to a statement of counsel for the defendant on cross-examination of a witness introduced on behalf of the plaintiff. The questions asked and statement of counsel are set forth in a bill of exceptions as follows:

"Q. Do you know where that shanty, in which Lee Owen lives is? A. No, I don't visit there.

"Q. I didn't ask you if you visited there; I asked you do you know where that little red shanty is? A. No, sir.

"Q. Do you know where the spur from this track which goes in a southern direction is? A. Yes, sir, I know where there is a track that goes down the branch like.

"Q. Don't you know, as a matter of fact, that there is a little red shanty there between this track and that? A. No, I have not visited it at all.

"Q. I didn't ask you if you had visited it, Mr. Turner; we are not trying to prove you have visited it. The point I am asking you, and I want you to answer, if you will pay attention, is this: I know, Mr. Turner, this situation myself, and there are others who know it, and I want to ask you to see if we coincide.

"Mr. Peterson: I object to the statement.

"The Court: I overrule the objection.

"Mr. Peterson: We except."

We see nothing in this that could have prejudiced the plaintiff. The exception was, therefore, properly overruled.

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The fourteenth assignment of error was to the action of the court in declining to order a view of the premises. The question of the propriety of ordering a view lies largely in the discretion of the trial court, which should only grant it when it is reasonably certain that it will be of substantial aid to the jury in reaching a correct verdict, and whose decision will not be reversed unless the record shows that a view was necessary to a just decision. *Cutchin* v. *Roanoke*, 113 Va. 452, 74 S. E. 403; *Stonegap Colliery Co.* v. *Hamilton*, 119 Va. 271, 89 S. E. 305, Ann. Cas. 1917 E, 60. There is no controversy here as to the location of the road, and the general conditions surrounding it, and there was no necessity for a view in order to assist the jury in understanding the testimony. The testimony in connection with a plat used on the trial would seem to have been clear enough without the necessity for a view. In addition to this, it appears that delay in the trial would have been caused by ordering a view, and that the plaintiff had not made any provision to take the jury to the scene of the fire. We think there was no error in the action of the trial court in refusing to order a view.

For the errors committed, as pointed out in considering assignments of error Nos. 3, 10 and 11, the judgment of the trial court must be reversed.

Reversed.

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Richmond.

BERLIN v. WALL AND OTHERS.

March 21, 1918.

1. NEGLIGENCE—*Questions of Law and Fact.*—Where the facts as to the alleged negligence are clear and undisputed, the court must say as a matter of law whether or not they constitute negligence, and this is true whether the issue is raised by demurrer to the declaration or demurrer to the evidence.
2. LANDLORD AND TENANT—*Several Tenants—Parts of Premises Used in Common Controlled by Landlord—Liability of Landlord.*—A landlord who leases separate portions of the same building to different tenants and retains control of the stairways and passageways used in common by all the tenants, is under an implied obligation to use reasonable care to keep the parts reserved in a safe condition for use, and a failure to perform that duty renders him liable for an injury resulting therefrom to a tenant or a member of his family, or any person properly on the premises who is himself free from fault.
3. LANDLORD AND TENANT—*Several Tenants—Parts of Premises Used in Common Controlled by Landlord—Liability of Landlord—Defective Skylight—Case at Bar.*—In the instant case defendants leased to plaintiff's father, for the use of himself and family, including the plaintiff, an infant about six years old, three rooms on the second floor of a building owned by the defendants. These rooms opened upon another room, which was used in common by all of the tenants of the building. Defendants retained and exercised control over this room. In this room there was a skylight made of double-thick window glass, and not of the glass commonly used in making a skylight. Defendants knew of the weakness of this glass, but did not warn plaintiff. Prior to the lease of the rooms the defendants had erected a railing about thirty-two inches high around the skylight. Plaintiff climbed or fell through the opening between the planks of the railing, or from the top of the railing through the skylight to the floor beneath, as the result of which he was injured. The most cursory examination by the lessee would have disclosed the material of which the skylight was constructed. Neither the tenant nor any

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member of his family had any right thereon. The barrier stood as a constant notice and warning that it was not intended to be walked over, and all of these facts were perfectly manifest.

Held: That plaintiff could not recover in an action against defendants for damages for this injury.

4. LANDLORD AND TENANT—*Common Premises—Duty of Landlord—Case at Bar.*—All that is required of a landlord who retains control of a room used in common by his tenants is that he should make and keep the room in a reasonably safe condition for the purpose to which it is devoted. In the instant case plaintiff had not been invited to go upon that part of the room about which the defendants had erected a barrier. Indeed, it had been definitely withheld from use, and the barrier not only cut it off and prevented such use by the tenants, but distinctly and definitely warned them not thus to use it. The part of the room taken up by the skylight was reserved by the lessors for the manifest purpose of giving light to the tenant of the room below, the railing was itself a proclamation of this reservation and the reason therefor, and the plaintiff had no access to the skylight except by ignoring the warning and climbing through or over the barrier. Neither the lessee nor his family had been invited to go inside of that barrier, and the railing was in itself sufficient notice of the reservation of the space so enclosed, a continuous prohibition against the use of such space and a constant warning of the danger of disregarding such notice, and the defendants did not owe to the tenant or his family the duty of protecting them against the consequences of such disregard.

5. NEGLIGENCE — *Foundation of Liability — Degree of Care.*—It is fundamental that in an action for personal injury alleged to have been occasioned by the negligence or default of another, it must be shown that the defendant owed some duty or obligation to the party injured which he failed to discharge. It is always easy after an accident has occurred to show that, if something which was not done had been done, the accident could have been prevented; but proper care in such a case does not require the anticipation of every accident that can happen, or the providing of every conceivable safeguard for the prevention of any possibility of an accident. It does, however, require the exercise of reasonable care to avoid accidents which, according to observation and experience, are likely to happen.

6. LANDLORD AND TENANT—*Liability of Landlord—Case at Bar—Defective Skylight.*—In the instant case the skylight in ques-

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tion was covered with dust, which plaintiff alleged concealed the defect. It was held, however, that if the accident was naturally to be anticipated, because of the accumulation of dust on the skylight, it was as much to be anticipated by the tenant as by the landlord.

7. LANDLORD AND TENANT—*Liability for Injury.*—Though it is the duty of the landlord to keep in repair that portion of the leased premises which he retains for the use of the several tenants in common, still another general rule is that the landlord is not liable to the tenant, or members of his family, whether infant or adult, for the defective condition or faulty construction of the leased premises over which the tenant has exclusive control existing at the time of the lease, unless there was misrepresentation, active concealment, or perhaps total inability on the tenant's part to discover the defect.

8. LANDLORD AND TENANT—*Liability for Injury—Case at Bar.*—In the instant case there was no failure to keep in repair, and the defect, if it was a dangerous defect, was apparent, and the railing stood there as a constant warning to the tenant and his family that the portion of the room within the barrier was not for common use, and that it was not such a skylight as could be safely walked over.

Error to a judgment of the Circuit Court of the city of Lynchburg, in an action of trespass on the case. Judgment for defendants. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Amonette & Bailey, Jno. L. Lee and *R. C. Blackford,* for the plaintiff in error.

N. C. Manson, Jr., for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

Saul Berlin, an infant suing by Israel Berlin, his father and next friend, instituted his action of trespass on the case against Ellen M. Wall and others, the owners of a building leased to the father of the infant plaintiff, to recover dam-

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ages for an injury resulting from a fall through a skylight to the floor beneath. The trial court sustained a demurrer to the declaration, entered judgment thereon for the defendants, and the plaintiff assails the correctness of that judgment.

The facts relied upon by the plaintiff, in substance alleged in the declaration and therefore admitted by the demurrer, are these: That during the year 1912 the defendants leased to Israel Berlin, for the use of himself and family (including the plaintiff) three rooms on the second floor of a building owned by the defendants in Lynchburg. These rooms opened upon another room, which was used in common by all of the tenants of the building, at one end of which was a water closet, also used in common by all of the tenants on the second floor, and the defendants retained and exercised control over these parts of the building so used in common by the tenants. In this room leading from the rooms of Israel Berlin, the father of the plaintiff, to the water closet was a skylight, made of double-thick window glass, about a quarter of an inch thick, and not of the glass commonly used in making a skylight. This skylight was composed of nine pieces of glass, 26 by 28 inches in size, fitted into a sash, which sash was fitted into the floor. The defendants knew of the thinness and weakness of this glass composing the skylight, but they neither warned the plaintiff, nor did they impart to him any knowledge of the dangerous condition of the skylight. That the said Israel Berlin could not by ordinary inspection determine the weak and dangerous character of the skylight, since the glass was covered with dust and there was nothing to indicate that the skylight was of other than skylight glass. Prior to the lease of the rooms the defendants had erected around three sides of the skylight (the fourth side being protected by the wall of the room) a railing about thirty-two inches high, consisting of three strips of plank

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three inches wide and a top rail. The first plank was placed five inches above the floor, while the second was eight inches above the first, thus leaving a space eight inches wide, and the other spaces were five inches wide. The water closet being a room at the end of the room in which the skylight was, it was necessary for the tenant and his family, including the plaintiff, to pass and repass the skylight in order to make use of the water closet. The children of the tenants used this room, in which the skylight was, for the purpose of playing, which the declaration alleges that the defendants knew, or ought to have known. On or about March 13, 1915, the plaintiff, an infant about six years of age, crawled, climbed or fell through the opening between the planks of the railing, or from the top thereof, on, against or through the skylight to the floor beneath, a distance of about twenty feet, as the result of which he was injured.

The grounds of demurrer here relied on in substance are: That the skylight through which the plaintiff fell was not such a defect as to render the defendants liable; that there was no such negligence in the manner in which the enclosure was constructed and maintained as to render the defendants liable; that the skylight was separated from the room in which the plaintiff was accustomed to play and through which he had to pass by a railing so constructed that plaintiff could not reach the skylight without climbing over or pushing between the strips of the railing; that the skylight was in the same condition at the time of the accident as at the time of the lease and, if defective, it was an open defect existing at the time of the lease; that the skylight, enclosed as it was, was not a dangerous defect; that the defects complained of could not be remedied without changing the construction of the leased premises; that the defendants owed plaintiff no duty which they failed to dis-

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charge; and that the accident was not the natural, or reasonably to be expected, result of the manner in which the skylight, or the enclosure around it, was constructed.

The briefs of counsel on both sides so thoroughly discuss and analyze the pertinent authorities relating to the respective rights and duties of landlords and tenants, and are thus so helpful to the court, that we are relieved of much labor which otherwise would be necessary. In our view of the case, however, it is not necessary for us to follow their example, and we shall therefore limit our discussion to the questions of law and fact which appear to be controlling in this case.

The argument of counsel for the plaintiff in error, in its last analysis, rests the claim to recover upon the rule which is thus stated in 1 Tiffany on Landlord and Tenant, at p. 628: "It frequently happens that the owner of a building demises separate parts thereof to different tenants, access to which parts is by means of a passage, stairway or other means of approach, which, while intended for the use of the different tenants, is not, in itself, included in the demise to any one of them and consequently remains in control of the landlord. In such case the landlord in effect invites the use of such passages or stairway by the tenants, and by other persons whose relations to the tenants involve their use of these approaches in order to obtain access to the rooms or apartments demised, and he is accordingly regarded as liable both to the tenant and such other persons, for any injury caused by his failure to exercise reasonable care to keep such parts of the building in proper repair, as is any owner of land or of structures thereon as regards persons whom he expressly or impliedly invites to enter thereon."

In the case of *Siggins* v. *McGill et al.*, 72 N. J. Law, 263, 62 Atl. 411, the same rule is approved, and in the note thereon (3 L. R. A. [N. S.] 316, 111 Am. St. Rep. 666), it is succinctly stated thus: "The general rule seems to be

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that a landlord who leases separate portions of the same building to different tenants and retains control of the stairways and passageways used in common by all the tenants, is under an implied obligation to use reasonable care to keep the parts reserved in a safe condition for use, and a failure to perform that duty renders him liable for an injury resulting therefrom to a tenant or a member of his family, or any person properly on the premises who is himself free from fault." Citing many cases.

The doctrine is approved in *Nesbitt* v. *Webb*, 115 Va. 362, 79 S. E. 330. It is also stated in *Bennett* v. *Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, that the rule is "founded in justice and necessity and illustrated in many adjudged cases in the American courts that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation."

The lessor has been, therefore, held liable where he failed to give notice that the premises were infected with disease, that a well was polluted, that offensive or noxious odors were emitted from a cesspool or drains on the premises, that timbers under a floor, and therefore concealed from ordinary observation, were rotten, and that injury to health or body resulted from such undisclosed conditions.

In this case, the facts as to the alleged negligence being clear and undisputed, the court must say as a matter of law whether or not they constitute negligence. This is true, of course, whether the issue is raised by demurrer to the declaration or demurrer to the evidence. *Clark, by, etc.* v.

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City of Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; *Richmond* v. *Lambert,* 111 Va. 174, 68 S. E. 276.

All then that the rule relied upon required of the defendants was to make and keep the room in a reasonably safe condition for the purpose to which it was devoted. The plaintiff, however, had not been invited to go upon that part of the room about which the defendants had erected a barrier. Indeed, it has been definitely withheld from use, and the barrier not only cut it off and prevented such use by the tenants, but distinctly and definitely warned them not thus to use it. The part of the room taken up by the skylight was reserved by the lessors for the manifest purpose of giving light to the tenant of the room below, the railing was itself a proclamation of this reservation and the reason therefor, and the plaintiff had no access to the skylight except by ignoring the warning and climbing through or over the barrier. Neither the lessee nor his family had been invited to go inside of that barrier, and the railing was in itself sufficient notice of the reservation of the space so enclosed, a continuous prohibition against the use of such space and a constant warning of the danger of disregarding such notice, and the defendants did not owe to the tenant or his family the duty of protecting them against the consequences of such disregard.

By analogy, the principle enforced in *Clark, by, etc.* v. *City of Richmond, supra,* applies to the facts of this case. The city of Richmond had excavated, under an agreement with the owner, a portion of a lot immediately adjoining Fourth street. This excavation was separated from the sidewalk only by a wall from 15 to 24 inches above the general level of the sidewalk. The plaintiff, a small child, six years of age, came up the sidewalk, using the walkway until near the end of the square, when, without any necessity therefor, he got on top of the wall, and while standing or walking thereon fell into the area. It was held in that case

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that the plaintiff was not entitled to recover, and the court said that the wall or coping may be said to have furnished the plaintiff an ample barrier so long as he was using the sidewalk for the purposes of travel. The child had the right to be on the sidewalk, and the city was bound to use reasonable care to keep it in a reasonably safe condition for his use while he remained there, but it was under no obligation to provide for his safety when he left the street and got upon the barrier which had been placed there for his protection. So, here, so long as the plaintiff used that portion of the room expressly devoted to purposes of play and for access to the water closet, the enclosure around the skylight furnished him ample protection.

The case of *Lynchburg Telephone Co.* v. *Booker*, 103 Va. 594, 50 S. E. 148, is relied upon by the plaintiff in error. We do not think it applicable to this case. There an eight year old child, sitting in the street, reached through the fence and grasped a live wire dangling through the branches of a tree, and the telephone company was held responsible; but one difference between that case and this is, that the child, when injured, was in the street where he had a right to be, and the danger negligently maintained by the telephone company was within reach of his hand.

Another case relied upon to sustain a recovery is that of *Hess* v. *Hinkson's Adm'r* (Ky.), 96 S. W. 436; but in that case there was a hole about two feet wide and one foot high in the side of a closet which was used in common by tenants, through which a child crawled out on a roof and fell through a skylight. One difference between that case and this is that there was no barrier or warning of any sort to indicate that it would be dangerous to do so.

On the other hand, in *McAlpin* v. *Powell*, 70 N. Y. 126, 26 Am. Rep. 555, where a child passed through an open window to a platform, and thence to a trapdoor, through which he fell, the landlord having negligently failed to pro-

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vide a proper fastening for the trapdoor, it was held that the plaintiff could not recover of the landlord. *Mayor* v. *Laux*, 18 Misc. Rep. 671, 43 N. Y. Supp. 743, illustrates the same principle.

In *Andrews* v. *Williamson*, 193 Mass. 92, 78 N. E. 737, 118 Am. St. Rep. 452, in which the wife of the tenant was injured by the breaking down of one of the steps of a stairway as she was passing over it, a recovery was denied upon the doctrine thus stated: "With respect to the repair of a stairway over which the tenants have only a right of way in common, and which is kept within the control of the landlord, he owes the duty of due care to keep it in the condition in which it was, or appeared to be, at the time of the letting, but he is not bound to change the mode of construction.

Of course, it is fundamental that in an action for personal injury alleged to have been occasioned by the negligence or default of another, it must be shown that the defendant owed some duty or obligation to the party injured which he failed to discharge. It is always easy after an accident has occurred to show that, if something which was not done had been done, the accident could have been prevented; but proper care in such a case does not require the anticipation of every accident that can happen, or the providing of every conceivable safeguard for the prevention of any possibility of an accident. It does, however, require the exercise of reasonable care to avoid accidents which, according to observation and experience, are likely to happen. Watson on Damages, section 38.

It is maintained by the defendants that this accident was not the natural result of the manner of construction of the skylight. The plaintiff claims that it should have been constructed of skylight glass, and that the failure so to construct it made it a menace and constitutes the negligence for which the defendants are responsible. If, however, it

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had been constructed of skylight glass, no barrier would have been necessary, and the lessors could have safely allowed the tenant and his family unobstructed access to the entire room. Inasmuch as it was not constructed of skylight glass, the barrier became proper as a notice, and in the exercise of due care necessary. One fact relied on to show that the alleged defect was concealed from the plaintiff was, that the glass was covered with dust, but this was surely as apparent to the lessee as it was to the lessors; and the charge of concealment cannot be founded on such a circumstance.

There are a number of Virginia cases in which it has been held that the defendant was not liable because the injury was not the natural result to be expected from the negligence complained of. In *Winfree* v. *Jones*, 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201, a tenant abandoned the landlord's premises and left a door open. Thereafter some one who had no legal right in the house, but who obtained access thereto by reason of the unlocked door, negligently set it on fire, and the court declared as a matter of law that such a result was not to be expected and that the negligence of leaving the house open was not the proximate cause of the fire; hence that there could be no recovery by the owner against the tenant because of the unexpected result of such negligence.

In *Newport News, etc., Ry. Co.* v. *Clark*, 105 Va. 205, 52 S. E. 1010, 6 L. R. A. (N. S.) 905, 115 Am. St. Rep. 868, it was held that the death of a child who ran into a rope stretched across the sidewalk and was killed, was not the natural result of stretching a three-quarter inch rope across a sidewalk, and the fact that it was customary also to place a guard at the point of obstruction to warn persons against injury from falling substances, and that none was placed there in that case, did not change the conclusion.

If this accident was naturally to be anticipated, because

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of the accumulation of dust on the skylight, it was as much to be anticipated by the tenant as by the landlord. All that had to be done was to reach the hand over the 32-inch railing, or through one of the spaces in it and rub off the dust, for this was the only thing that prevented the lessee from detecting that the alleged faulty construction of the skylight made it a source of danger to his child.

It is to be observed in this connection that while the same conditions had existed during the fourteen months which had intervened between the lease of the premises and the accident, and the tenant and his children had used the room during all that period, no accident had occurred, and of course we must assume that the tenant did not anticipate such an accident or he would have kept closer watch over his child.

Though it is the duty of the landlord to keep in repair that portion of the leased premises which he retains for the use of the several tenants in common, still another general rule is that the landlord is not liable to the tenant, members of his family, whether infant or adult, for the defective condition or faulty construction of the leased premises over which the tenant has exclusive control existing at the time of the lease, unless there was misrepresentation, active concealment, or perhaps total inability on the tenant's part to discover the defect. *Smith* v. *Wolsiefer,* 119 Va. 247, 89 S. E. 115; *Looney* v. *McLean,* 129 Mass. 35, 39 Am. Rep. 295; Wood on Landlord & Tenant 921; Taylor on Landlord & Tenant (9th ed.) 220.

In this case there is no failure to keep in repair, and the defect, if it was a dangerous defect, was apparent, and the railing stood there as a competent warning to the tenant and his family that the portion of the room within the barrier was not for common use, and that it was not such a skylight as could be safely walked over.

In *Woods* v. *Naumkeag Steam Cotton Co.,* 134 Mass.

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359, 45 Am. Rep. 344, where the tenant's wife was injured owing to the defective condition of a common stairway, there being no railing on either side of it, the steps being so constructed as to cause an accumulation of ice and snow, it was held that the landlord was under no obligation to change the original construction of the steps for the benefit of the tenant, and that as the structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the building to the time she received the injury, there could be no recovery.

The general doctrine is stated in 1 Tiffany on Landlord & Tenant, p. 634, thus: "The landlord is under no obligation to the tenant to change the mode of construction of the passageways, stairs or platforms, used in common by the tenants, and to construct them upon a different plan, in order to make them more safe, provided the mode of construction was apparent at the time of the letting. His obligation has been said to be merely to keep such a place 'in such condition as it was in, or purported to be in, at the time of the letting,' meaning thereby such condition as it would appear to be in to a person of ordinary observation, and having reference to the obvious condition of things existing at the time of the letting. Accordingly, it has been held, a landlord is not liable for injuries caused by the rotten condition of a platform which was evidently in that condition at the time of the lease"—citing *Woods* v. *Naumkeag Steam Cotton Co., supra; Quinn* v. *Perham,* 151 Mass. 162, 23 N. E. 735; *Lynch* v. *Swan,* 167 Mass. 510, 46 N. E. 51; *O'Malley* v. *Twenty-Five Associates,* 176 Mass. 555, 60 N. E. 387; *Humphrey* v. *Wait,* 22 U. C. C. P. 580; *Rogers* v. *Sorrell,* 14 Man. Rep. 450; *Andrews* v. *Williamson,* 193 Mass. 92, 78 N. E. 737, 118 Am. St. Rep. 452.

Here, then, we have a skylight, the construction of which was perfectly open and apparent, or easily discoverable, by the tenant at the time the lease commenced, with its railing

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protecting from accident those who were inattentive, and if this constituted a dangerous defect therein, as is claimed, such peril was as apparent to the tenant as it was to the landlord. If it could have been discovered by the tenant by a reasonable inspection thereof, the defendants are not liable for the injury resulting therefrom. *Moynihan* v. *Allyn*, 162 Mass. 270, 38 N. E. 497; 16 R. C. L. 1040, 1067.

Fairminded men cannot differ as to the proposition that the most cursory examination by the lessee would have disclosed the material of which the skylight was constructed. Neither the tenant nor any member of his family had any right thereon. The barrier stood as a constant notice and warning that it was not intended to be walked over, and all of these facts were perfectly manifest. Dangers constantly beset unattended small children, and the defendants cannot be held responsible for the happening of an accident from a possible danger, the existence of which was disclosed to the parents and natural guardians of the infant plaintiff, and of which the defendants had given sufficient warning. The accident would not have occurred had this warning been heeded, and our judgment accords with that of the trial court.

Affirmed.

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Syllabus.

Richmond.

CAMP AND MEEHL v. CHRISTO MANUFACTURING COMPANY.

March 21, 1918.

1. PLEADING—*General Issue—Sales.*—In an action at law by motion to recover the amount of certain promissory notes executed by the defendants in favor of the plaintiff, the defense relied on was that the notes evidenced but a part of a certain contract of sale in writing between the plaintiff and defendants executed by them at the same time the notes were executed; that the plaintiff in pursuance of the contract insured its interest in the subject of the sale against loss by fire, and upon its loss by fire collected the insurance, which the defendants were entitled to have credited on the indebtedness evidenced by the notes, but which the plaintiff refused to so credit. Although the notes, and not the contract, were sued on upon the face of the notice of motion, the testimony introduced by the plaintiff itself disclosed that the notes constituted a part of a written contract between the parties, all entered into at one and the same time. Hence, the action on the notes was an action on the written contract also and the general issue involved the question of what was that contract and the effect of it upon the obligation of the notes; therefore, the defense above stated was provable and could be relied on by the defendants under their plea of the general issue, and no special plea was necessary to put such defense in issue.

2. SALES—*Contract to Insure.*—When the vendor of property on credit effects insurance upon it in pursuance of the contract of sale, the insurance is collateral security for the payment of the debt and the vendor must credit the debt by whatever amount he may realize from such insurance if not in excess of the debt, and if in excess of the debt, the residue must be paid over by the vendor to the vendee. And this is true whether the insurance be of property or only of the vendor's insurable interest therein.

3. SALES—*Contract to Insure.*—If the vendor effects, for his own benefit, insurance on the property sold, independently of any contract with the vendee on the subject, the latter is entitled to no benefit from the insurance.

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4. SALES—*Contract to Insure.*—Where there is a contract between vendor and vendee containing a covenant with respect to insurance, the insurance taken out while such contract is in force will be presumed to have been effected in pursuance of the contract, in the absence of evidence to the contrary.

Error to a judgment of the Corporation Court of the city of Hopewell, in a proceeding by motion for a judgment for money. Judgment for the plaintiffs. Defendant assigns error.

Reversed and Remanded.

STATEMENT OF THE CASE AND FACTS.

This is an action at law by motion of the defendant in error (hereinafter referred to as plaintiff) against the plaintiffs in error (hereinafter referred to as defendants) to recover the amount of certain promissory notes executed by the defendant in favor of the plaintiffs.

The defense relied on is, in substance, that said notes evidenced but a part of a certain contract in writing between the plaintiff and defendants executed by them both at the same time the notes were executed by the defendants. That the subject of such contract was a soda water fountain for the purchase price of which said notes were given; that the plaintiff after said contract was executed, and in pursuance of said contract, insured its interest in said property against loss by fire; that the said property was destroyed by fire; and that before said action was instituted the plaintiff collected from such insurance an amount to the defendants unknown, which the defendants were entitled to have credited on said indebtedness evidenced by said notes, but which the plaintiff did not so credit, or any part thereof, and refused so to do.

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THE EVIDENCE AND FACTS.

The material evidence in the cause shown by plaintiff's own witnesses is that said written contract contained the following provision:

"And I" (the defendants) "agree to insure the said property" (the soda water fountain) "promptly and keep the same insured, at my own expense, loss, if any, payable to you" (the plaintiff) "as your interest may appear; and I will forward you the policies covering the same. If I delay furnishing insurance you may at your option insure your interest, and I will pay the premium."

The president of the plaintiff testified that at the time the contract was executed he knew that the defendants could not get fire insurance where their business was located; that the defendants then in fact so informed the plaintiff and that they (the defendants) could not themselves take out such insurance; but such president testified that he did not promise or make any binding obligation that the plaintiff would take out and carry such insurance. There is other testimony for the plaintiff to the same effect. The witnesses for plaintiff admit, however, that after the contract was executed and the said property was sold and delivered to the defendants the plaintiff did insure their interest in said property by a blanket policy of insurance; that such property was afterwards destroyed by fire and the plaintiff collected from such insurance some $250 or $269 (the exact amount not being shown by the evidence) which the plaintiff claimed as its own money on the ground that it was collected from insurance independently effected by the plaintiff, as plaintiff claimed on the trial; and that the defendants were not entitled to receive any credit therefor on said indebtedness.

There is no other evidence bearing on the question as to whether said insurance was effected in pursuance of said contract or independently thereof by the plaintiff.

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The defendants attempted to prove that the provision in the contract in writing above quoted was altered by mutual agreement before the contract was signed so as to provide, in substance, a positive obligation on the part of the plaintiff to carry fire insurance "and stand the risk of loss;" but the testimony for the defendants fall short of furnishing any evidence of any probative value to sustain such attempted proof, so that the foregoing statement of evidence must be taken to show the material facts of the case.

FURTHER PROCEEDINGS.

There was a trial by jury which resulted in a verdict and judgment thereon for the plaintiff for the full amount claimed by it.

There was a motion by the defendants before the court below to set aside the verdict because of misdirection of the jury and on other grounds.

The assignment of error with respect to the alleged misdirection of the jury is the giving by the trial court of instructions Nos. 1, 3 and 4, as asked for by the plaintiff. Numbers 1 and 3 of those instructions were as follows:

Instructions of Plaintiff (Given). "No. 1. The court instructs the jury that if they believe from the evidence that the plaintiffs and defendants entered into the contract of September 29, 1915, and by virtue thereof the plaintiff sold and delivered to the defendants the property mentioned in the contract and evidenced by notes of the defendants, they must find for the plaintiff for the amount sued for with interest and ten per cent. attorney's fee."

Instruction No. 3 (Given). "The court instructs the jury that if they believe from the evidence that the plaintiffs, the Christo Manufacturing Company, carried a blanket credit insurance on the property in this case along with all the other property sold by them under like terms and con-

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ditions, that said insurance is but an insurance of the debts owing to the plaintiffs in which the defendants have no interest and they must find for the plaintiff so far as the question of insurance in this case is concerned; unless they also believe from the evidence that the contract was an express stipulation on the part of the plaintiffs that they would stand all loss in case of destruction by fire of the property."

Of the other assignments of error it is sufficient to say that one of them raises the question before us whether a special plea was necessary to put in issue the defense aforesaid.

Robert G. Hundley and *C. H. Morrisette,* for the plaintiffs in error.

Lemon & Blankenship, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

1. The defense above stated was provable and hence could be relied on by the defendants under their plea of the general issue, and no special plea was necessary to put such defense in issue. It is true the notes, and not the contract, were sued on upon the face of the notice or motion. But the testimony introduced by the plaintiff itself disclosed that the notes constituted a part of a written contract between the parties, all entered into at one and the same time. Hence, the action on the notes was an action on the written contract also and the general issue involved the question of what was that contract and the effect of it upon the obligation of said notes. Further—

2. In the view we take of the case the fact that the contract in writing between the parties did not contain a positive obligation on the part of the plaintiff to insure its in-

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terest in the property which was the subject of the contract, is immaterial. The contract provided that the plaintiff had thereunder an option so to do. It did in fact, after the contract was made, insure such interest and subsequently realized from collection of such insurance some $250 or $269 for which it has not given the defendants any credit and declines to do so. Since the contract contained the express provision as to insurance above quoted, we are of opinion that the insurance, afterwards effected by the plaintiff in accordance with the option given it by such provision, must be taken to have been effected in pursuance of such contract, in the absence of any evidence to the contrary, except the mere claim of the plaintiff *post motem litem* that it effected the insurance independently. The insurance is presumed under such circumstances to have been taken out in accordance with the provision in the contract.

Such a provision as that contained in the instant case is a very frequent one in contracts such as that in question; and practically the same provision is often contained in mortgages and deeds of trust. It is well settled that when the vendor of the property effects insurance in pursuance of such a contract, the insurance is collateral security for the payment of the debt and the vendor must credit the debt by whatever amount he may realize from such insurance if not in excess of the debt, and if in excess of the debt, the residue must be paid over by the vendor to the vendee. And this is true whether the insurance be of property or only of the vendor's insurable interest therein. See note of Judge Freeman, 54 Am. Dec. 698-9; 2 May on Ins., sec. 452 B, 452 C; Vance on Ins., secs. 417, 419.

It is true that if the vendor effects, for his own benefit, insurance on the property sold, independently of any contract with the vendee on the subject, the latter is entitled to no benefit from the insurance. See 54 Am. Dec. 693, *et seq.*, and *Carpenter* v. *Providence Washington Ins. Co.*,

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16 Pet. (U. S.) 495, 10 L. Ed. 1044. But such is not the case before us as shown by the evidence in the record. And, as above noted, where there is a contract between vendor and vendee containing a covenant with respect to insurance, the insurance taken out while such contract is in force will be presumed to have been effected in pursuance of the contract, in the absence of evidence to the contrary.

The instructions above quoted erroneously disregarded the above mentioned rule of law. And as they directed a verdict in favor of the plaintiff for the full amount of its claim in disregard of such rule, and as the facts in the case as shown by the plaintiff's own evidence established that under such rule the defendants were entitled to the credit aforesaid, such action of the court affirmatively appears from the record to have been prejudicial to the defendants and hence was reversible error.

This being our conclusion, we find it unnecessary to consider or pass upon the other assignments of error of the defendants, as they are none of them such as are likely to arise on a new trial of the case.

The result of the above holding is that the judgment complained of was excessive to the extent of $250 or $269, the fire insurance money collected by the plaintiff which should have been credited, but was not credited, on the plaintiff's debt in accordance with the evidence in the case upon its trial in the court below. We are, therefore, of opinion to set aside and reverse the judgment, and remand the case to the trial court with instructions to put the plaintiff on terms to release the said excess amount of such judgment to the extent of the fire insurance money aforesaid collected by it of not less than $250, or to award a new trial, and if such excess is released to enter judgment for the correct amount of the plaintiff's debt so ascertained.

Reversed and Remanded.

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Richmond.

CARPENTER v. MEREDITH.

March 21, 1918.

1. AMENDMENTS—*Liberality in Allowing.*—It is the settled policy of our law to allow amendments in pleadings and to disregard defects in procedure which do not operate to the prejudice of the substantial rights of the opposite party.
2. AMENDMENTS—*Liberality in Allowing—Case at Bar.*—In an action for libel and slander, at the April rules, 1916, the plaintiff filed a declaration containing twelve counts, six under the common law and six under the statute for insulting words. At the succeeding term, upon demurrer by the defendant, the court permitted the plaintiff to eliminate from the declaration the six common law counts and to amend as to the remaining counts, which he did by filing an amended declaration. On the day following the filing of this amended declaration the defendant moved for a continuance and the court intimated a purpose to grant this motion. The plaintiff then asked and was allowed, over defendant's objection, to file a second amended declaration. Defendant's motion for a continuance was then renewed and granted, whereupon, the plaintiff asked and was allowed to withdraw the second amended declaration. On the calling of the case at the next term, the defendant moved the court to require the plaintiff to state whether he was going to trial on the original declaration or on the first amended declaration, and counsel for plaintiff stated that he would go to trial on both. Defendant objected, but the objection was overruled. The defendant then asked and was permitted, over the plaintiff's objection, to file a plea of the statute of limitations to the first count of the amended declaration. Thereupon, the plaintiff, over defendant's objection, was permitted to amend his first amended declaration, and this he did by filing an amended statement of the first count thereof and repeating literally the second and third counts thereof. The defendant moved to reject the first count as thus amended on the ground that it was barred by limitation, which motion was overruled and the defendant entered a plea of not guilty. The defendant claimed that the second amended declaration superseded all others, and that its withdrawal left the case without any pleading. While

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the record was not entirely satisfactory upon the subject, it seems reasonably clear that the court and the parties understood that the defendant's plea of the statute of limitations and of not guilty were directed to the last amended declaration, which purported to amend the six statutory counts of the original as formerly modified by the first amendment.

Held: That if it could be conceded that the procedure was irregular, the practical result was in accord with the settled policy of the law, as set forth in the preceding headnote.

3. AMENDMENTS—*Withdrawal—Case at Bar.*—The second amended declaration was withdrawn on the day on which it was filed. The cause stood practically as if the second amendment had never been filed. The filing and immediate withdrawal of the latter could not have prejudiced the defendant.

4. LIBEL AND SLANDER—*Limitation of Actions—Amendment—Case at Bar.*—It was urged that the insulting words attributed to the defendant in the first count of the amended declaration constituted a new cause of action. If this position was sound, the plea of the statute was good, because the words were alleged to have been uttered at a date more than twelve months prior to the amendment. A careful comparison of the original and amended averments, however, lead the Supreme Court of Appeals to the conclusion that the new matter had reference to and was merely an amplification of the charges contained in the original, and that the case did not, as claimed by the defendant, fall within the influence of the decision of that court in *Irvine* v. *Barrett*, 119 Va. 587, 89 S. E. 904.

5. LIBEL AND SLANDER—*Privilege—Candidate for Public Office—Plea of Justification—Case at Bar.*—As the plaintiff was the incumbent of a public office and a candidate for re-election, this rendered the occasion privileged, and it was the duty of the court to so declare, leaving it to the jury to determine whether the privilege was abused—that is to say, whether it was used in bad faith and with malice. But in the case at bar there could be no doubt that the language alleged to have been used by the defendant went beyond the realm around which the law, as recognized in this State, has thrown the protection of privilege, and constituted charges of moral turpitude and criminal dishonesty. There being no plea of justification, the charges were conclusively presumed to be false, and the trial court properly so instructed the jury. The failure to plead the truth of the words cut off any inquiry into that question. The only questions for the jury, therefore, were whether the defendant actually used the words, and, if so, what damage he should pay.

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These questions were submitted to the jury upon proper instructions and their verdict against the defendant must end the case.

6. LIBEL AND SLANDER—*Privilege—Candidates for Public Office.*—The conduct of candidates for public office is open to public criticism, and it is for the interest of society that their acts may be fully published with fitting comments or strictures. But the strictures and comments must not transcend the bounds of propriety prescribed by law. While a citizen has the right to make complaint of any misconduct or act showing a lack of qualification or fitness for office of a candidate, he may not falsely attribute moral turpitude to him.

Error to a judgment of the Circuit Court of Brunswick county, in an action of libel and slander.

Affirmed.

The opinion states the case.

B. A. Lewis and *E. R. Turnbull, Jr.*, for the plaintiff in error.

Marvin Smithey and *S. V. Southall*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is an action of slander and libel brought by T. H. Meredith against W. R. Carpenter in which there was a verdict and judgment for the plaintiff.

The history of the pleading in the case presents a rather anomalous and confusing situation and one which cannot be stated without regrettable prolixity and verbal repetition. It must be set out, however, because it forms the basis of one of the assignments of error.

At the April rules, 1916, the plaintiff filed a declaration containing twelve counts, six under the common law and six under the statute for insulting words. At the succeed-

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ing September term of the court the defendant demurred to the declaration and to each count thereof, and thereupon, pending argument on the demurrer, the court, upon motion of the plaintiff, permitted him to eliminate from the declaration the six common law counts and to amend as to the remaining counts, which he did by filing an amended declaration containing three counts, the first of which purported to amend four of the statutory counts, the second to amend a fifth and the third to amend a sixth thereof. This first amended declaration was filed on the 5th day of September. The defendant then asked for time in which to prepare a demurrer to the amendment, and the hearing was adjourned until the next day, September 6th, at which time defendant moved for a continuance. The court intimated a purpose to grant this motion, and the plaintiff then asked and was allowed, over defendant's objection, to file a second amended declaration purporting to amend each of the counts as theretofore amended. The motion for continuance was then renewed by defendant and was granted, whereupon, the plaintiff asked and was allowed to withdraw the second amended declaration.

On the calling of the case at the next term, the defendant moved the court to require the plaintiff to state whether he was going to trial on the original declaration or on the first amended declaration, and counsel for plaintiff stated that he would go to trial on both. This course was objected to by the defendant, but the objection was overruled. The defendant then asked and was permitted, over the plaintiff's objection, to file a plea of the statute of limitations to the first count of the amended declaration. Thereupon, the plaintiff, over defendant's objection, was permitted to amend his first amended declaration, and this he did by filing an amended statement of the first count thereof and repeating literally the second and third counts thereof. The defendant moved the court to reject the first count as thus

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amended on the ground that it was barred by limitation. The latter motion was overruled and the defendant entered a plea of not guilty.

The first, second, third and fourth assignments of error, discussed together in the petition, rest mainly upon the claim that the second amended declaration superseded all others, and that its withdrawal at the September term left the case without any pleading. The gist of these assignments may be summed up in the contention, quoted literally from the petition, "that the court was without jurisdiction to try a case that was not properly on the docket, and it was its duty to remand the same to rules and not let the plaintiff fall back on the many counts in the declarations that had been filed and ceased to be a part of the record; all prior declarations having been superseded by other declarations and the last withdrawal of the only declaration in the case."

The second amended declaration was withdrawn on the day on which it was filed. The cause stood practically as if the second amendment had never been filed. The filing and immediate withdrawal of the latter could not have prejudiced the defendant. While the record is not entirely satisfactory upon that subject, it seems reasonably clear that the court and the parties understood that the defendant's plea of the statute of limitations and of not guilty were directed to the last amended declaration, which purported to amend the six statutory counts of the original as formerly modified by the first amendment. This seems to have been the view entertained by the court, and if we concede that the procedure was irregular, the practical result was in accord with the settled policy of our law to allow amendments in pleadings and to disregard defects in procedure which do not operate to the prejudice of the substantial rights of the opposite party. *Standard Paint Co.* v. *E. K. Vistor & Co.*, 120 Va. 595, 605, 610, 91 S. E. 752; Acts 1914, chap. 331, page 641.

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The next assignment of error presents the question of the sufficiency of the plea of the statute of limitations to the first count of the amended declaration. It is urged that the insulting words attributed to the defendant in this amendment constitute a new cause of action. If this position be sound, the plea of the statute was good, because the words were alleged to have been uttered at a date more than twelve months prior to the amendment. A careful comparison of the original and amended averments, however, lead us to the conclusion that the new matter had reference to and was merely an amplification of the charges contained in the original, and that the case does not, as claimed by the defendant, fall within the influence of the decision of this court in *Irvine* v. *Barrett,* 119 Va. 587, 89 S. E. 904.

We pass now to the controverted questions bearing more directly upon the merits of the case, and in this connection it becomes necessary to state briefly the material facts.

In the summer of 1915, T. H. Meredith, the then incumbent of the office of treasurer of Brunswick county, was a candidate for renomination to the same office by the Democratic party in a legalized primary election to be held in August of that year. W. R. Carpenter, the defendant in this action, espoused the cause of one of Meredith's competitors. The contest became spirited and acrimonious. During the course of the campaign, according to evidence introduced on behalf of the plaintiff, Carpenter made the following statements, among others, about Meredith:

"Tom Meredith, the damn rascal, have reported taxpayers of this county insolvent and have gotten the accounts by some means out of the clerk's office. They are not there. He have reported J. M. Phillips insolvent. If you will go with me to Mr. B. A. Lewis' office I will show you a list certified by the clerk of fifty odd that he have done in the same way. * * *

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"Tom Meredith, the damn rascal, offered L. P. Brown this morning $10.00 for a tax receipt to keep it out of Otis Hall's and myself's hands. * * *

"Tom Meredith, the God damn rascal, have offered L. P. Brown a bribe."

That "Mr. Meredith had stolen a right smart of money that Otis Hall ought to have."

At the conclusion of the evidence the defendant requested the court to instruct the jury as follows:

"The court instructs the jury, that if they believe from the evidence that the defendant spoke words, or any of them, as charged in the declaration of and concerning the plaintiff, yet the presumption of law is that he spoke them honestly, believing in the truth of his statement, although such statements in fact were false or founded upon the most erroneous information; and, in order for the plaintiff to recover in this action, the burden is upon him to prove to your satisfaction that such statements were spoken with actual malice in fact towards the plaintiff."

The court gave this instruction as asked, but added, by way of amendment, over the objection and exception of the defendant, the following clause: "unless they believe from the evidence that the words spoken, or written of, or concerning the plaintiff, imputed to him moral delinquency or moral turpitude."

It will be observed that the court, by this instruction, recognized the occasion of the alleged conversation as privileged. The plaintiff contends that this was error in favor of the defendant. We do not think so. The plaintiff was the incumbent of a public office and a candidate for re-election. This rendered the occasion privileged, and it was the duty of the court to so declare, leaving it to the jury to determine whether the privilege was abused—that is to say, whether it was used in bad faith and with malice. These propositions are familiar and perfectly well settled.

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That the court was also right, however, in adding the amendment to the instruction is settled in Virginia by the case of *Williams Printing Co.* v. *Saunders*, 113 Va. 156, 73 S. E. 472, and by the weight of authority outside of this State.

In a copious and valuable note to *Black* v. *State Co.*, 93 S. C. 467, 77 S. E. 51, Ann. Cases, 1914-C, p. 997, the annotator says: "The weight of authority seems to favor what may be considered as the narrow view, which is to the effect that while fair criticism and comment on the merits and demerits of candidates for office are privileged if made in good faith, false statements of facts are not privileged," citing a number of cases from many States, including Illinois, Massachusetts, New York, Ohio, Virginia and West Virginia.

In *Sweeney* v. *Baker*, 13 W. Va. 158, 31 Am. Rep. 757, Green, President, in concluding an exhaustive consideration and discussion of the question at issue, said: "The fact that one is a candidate for an office in the gift of the people, affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse, if he did not occupy the position of such candidate, whether the publication be made by the proprietors of a newspaper, or by a voter, or other person having an interest in the election. The conduct and actions of such candidate may be freely commented upon; his acts may be canvassed, and his conduct boldly censured. Nor is it material that such criticism of conduct should in the estimate of the jury be just. The right to criticize the action or conduct of the candidate is a right on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action for libel for a publication criticizing the conduct or action of such a candidate, if a jury should hold his criticism to be unjust, his right of criticism would be a delusion,

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a mere trap. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is, that the criticism be *bona fide*. As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticized are not admitted, they must of course be proven. But as respects his person there is no such large privilege of criticism, though he be a candidate for such office. This large privilege of criticism is confined to his acts. The publication of defamatory language, affecting his moral character, can never be justified on the ground that it was published as a criticism. His talents and qualification mentally and physically for the office he asks at the hands of the people, may be freely commented on in publication in a newspaper, and though such comments be harsh and unjust no malice will be implied; for these are matters of opinion, of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate falsely crimes, or publish allegations affecting his character falsely."

In *Williams Printing Co.* v. *Saunders, supra,* Keith, President, after pointing out that the privilege with which he was dealing in that case, and with which we are dealing in the instant case, is known as a qualified privilege, said: "Publications of the truth regarding the character of a public officer and relating to his qualifications for such office, made with intent to inform the people, are not libelous, but the publication of falsity and calumny against public officers and candidates for public offices is a very high offense. *Commonwealth* v. *Clap,* 4 Mass. 163, 3 Am. Dec. 212. * * *

"Speaking on this subject, Mr. Cooley says: 'A candidate for public office does not surrender his private character to the public, and he has the same remedy for defamation as before; and the publication of false and defamatory statements concerning him, whether relating to his private character or public acts, is not privileged * * *'

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"The law is, as we have seen, that it is for the court to say whether or not the occasion is a privileged one, and, if it be one of privilege, whether a qualified or an absolute privilege, and by its instructions to guide the jury to a right conclusion. As the privilege with respect to the criticism of public officers, or candidates for public office, does not extend to the imputation of moral delinquency with reference to their private character, such imputations are libelous, and the party making them may be held liable therefor in a suit for slander, unless he can prove the charges to be true. In such case it is not sufficient to prove that the party publishing had good reason to believe and did believe them to be true, as a publication of this character is not even conditionally privileged. From the publication of such libelous charges the law implies malice, as well as damages to the plaintiff; and the jury may, therefore, on proof of the publication only, render a verdict for substantial damages. *Sweeney* v. *Baker*, 13 W. Va. 158, 31 Am. Rep. 757. And just here we will state that this case is one of unusual authority. It was an action for libel upon a man who was a candidate for the House of Delegates of West Virginia. The opinion was delivered by a judge of great distinction, and is a mine of learning and sound reasoning. It cites all of the Virginia cases upon the subject prior to the creation of the State of West Virginia, such cases being as binding authority in the new State as in the old. The case, therefore, may be accepted without hesitation as one of the highest authority."

There can be no doubt that the language alleged to have been used by the defendant went beyond the realm around which the law, as recognized in this State, has thrown the protection of privilege, and constituted charges of moral turpitude and criminal dishonesty. There being no plea of justification, the charges were conclusively presumed to be false, and the trial court properly so instructed the jury.

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Williams Printing Co. v. *Saunders, supra.* The failure to plead the truth of the words cut off any inquiry into that question. The only questions for the jury, therefore, were whether the defendant actually used the words, and, if so, what damage he should pay. These questions were submitted to the jury upon proper instructions and their verdict against the defendant must end the case.

In this connection it may be stated that one of the objections of the defendant to the instruction above mentioned was, that the amendment thereto improperly invaded the province of the jury by assuming that the defendant did, in fact, use the words ascribed to him. This objection is without merit. It is manifest, upon a reading of the instruction as a whole, that the court intended to leave to the jury the question whether the defendant spoke the words, or any of them, as charged in the declaration, and they could not have failed to understand this intention on the part of the court.

In answer to the contention that the case at bar is controlled by the decision of this court in *Gatewood* v. *Garrett,* 106 Va. 552, 56 S. E. 335, it is only necessary to say, that the distinction made by Judge Keith between that case and the case of *Williams Printing Co.* v. *Saunders,* prevails here. In the latter case Judge Keith said: "Instruction No. 3, it is claimed, is also supported by the opinion in *Gatewood* v. *Garrett, supra,* and we accept as law the instruction as it appears in *Gatewood* v. *Garrett.* It declares that the conduct of candidates for public office is open to public criticism, and it is for the interest of society that their acts may be fully published with fitting comments or strictures; but one of the differentiating features between the case before us and *Gatewood* v. *Garrett* is that, while the comments and strictures in that case were fitting—that is to say, suitable and proper to the occasion—those set out in the declaration in this case transcend the bounds of propriety prescribed by

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law, are in excess of the right and duty of a citizen to make complaint of any misconduct or act showing lack of qualification or fitness for office of a candidate, and attribute moral turpitude to the defendant in error."

There were other assignments of error, but the conclusions already expressed are decisive of the case. The judgment must be affirmed.

Affirmed.

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Richmond.

CARTER v. WASHINGTON AND OLD DOMINION RAILWAY.

March 21, 1918.

1. APPEAL AND ERROR—*More than One Trial.*—Where upon the second trial of a case a verdict in favor of the plaintiff was set aside as contrary to the law and the evidence, to which action the plaintiff excepted, and upon the third trial no evidence was introduced and there was a verdict for the defendant, and the plaintiff assigned as error the action of the trial court in setting aside the verdict of the jury on the second trial, and the entering of judgment for the defendant on the third trial, the established rule is that the Supreme Court of Appeals will look first to the record of the second trial, and if there was error in setting aside that verdict, no further inquiry will be made and judgment will be entered by that court thereon.
2. APPEAL AND ERROR—*Affirmance or Reversal—Evidence Certified.*—Where the evidence is certified, the Supreme Court of Appeals will consider the whole evidence and sustain the verdict, unless it be against the law and the evidence, or without evidence.
3. LAW OF THE CASE—*Statement of the Doctrine.*—Where there have been two appeals in a case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal.
4. LAW OF THE CASE—*Different Facts on Second Trial.*—The doctrine of the "law of the case" can only be invoked, even between the same parties, where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts.
5. LAW OF THE CASE—*Different Facts on Second Trial—Case at Bar.*—In an action by a railway mail clerk against a carrier for injuries sustained, it appeared that the accident was due to the removal of a device called a catcher and safety bar,

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fixed across the side doors of a postal car, as required by the regulations and instructions of the United States Post Office Department. On the first trial a judgment for plaintiff was reversed on the ground that the plaintiff knew of the removal of the bar and had acquiesced in its removal. But on the second trial it appeared from the plaintiff's testimony that he did not either know of the removal of the bar or acquiesce therein.

Held: That the evidence upon the second trial as to the plaintiff's contributory negligence was materially different from the evidence upon the first trial with reference to that fact, and therefore the decision in the first case was not the law of the second case.

6. CARRIERS OF PASSENGERS—*Who are Passengers—Postal Clerk.*—A postal clerk upon a railway mail car is a passenger, and therefore entitled to the very highest degree of care from the carrier.

7. CARRIERS—*Postal Clerk—Contributory Negligence—Case at Bar.*—If in the case at bar, the plaintiff, a railway mail clerk, went to the door of the poorly lighted car in the performance of his duties, while the train was in motion, knowing that the safety bar had been removed, and was thrown out of the car because he failed to take proper precautions for his own safety, then it is clear that he was guilty of such contributory negligence as bars any recovery. On the other hand, if under such circumstances he went to the door of the car, not knowing that the safety bar upon which he had been accustomed to rely had been removed, and without any contributory negligence on his part, sustained the injury complained of, as appears from his testimony, then he is entitled to recover.

8. APPEAL AND ERROR—*Judgment by Appellate Court.*—If the court below erred in setting aside a verdict for the plaintiff, as contrary to the law and the evidence, the Supreme Court of Appeals will enter the judgment thereon which the trial court should have entered.

Error to a judgment of the Circuit Court of Fairfax county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Moore, Keith, McCandlish & Hall, for the plaintiff in error.

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W. J. Lambert, C. E. Nicol and *C. Vernon Ford,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

There have been three trials in this case. The first resulted in a judgment in favor of the petitioner, which was reversed by this court for errors in granting certain instructions requested by the plaintiff, and in amending one instruction requested by the defendant (*Washington & Old Dominion Railway* v. *Carter,* 117 Va. 424, 85 S. E. 482), and the case was remanded to be further proceeded with in accordance with the views expressed in the opinion. On the second trial there was a verdict in favor of the plaintiff, which the trial court set aside as contrary to the law and the evidence, to which action the plaintiff excepted. At the third trial no evidence was introduced and there was a verdict for the defendant company.

The petitioner assigns as error the action of the trial court in setting aside the verdict of the jury on the second trial, and the entering of judgment for the defendant on the third trial.

The established rule in such cases is that this court will look first to the record of the second trial, and if there was error in setting aside that verdict, no further inquiry will be made and judgment will be entered by this court thereon. Code, section 3484; *Humphreys* v. *Valley Railroad Company,* 100 Va. 749, 42 S. E. 882.

The evidence being certified, the court will consider the whole evidence and sustain the verdict, unless it be against the law and the evidence, or without evidence.

"Where the plaintiff comes to this court with the verdict of the jury, who are the proper triers of the facts, and whose judgment is entitled to especial weight in all cases where there is a conflict of evidence and questions as to the credi-

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bility of witnesses, in his favor, the court should look to the whole evidence upon the first trial and sustain the verdict rendered upon that trial, unless it can perceive that there has been a plain deviation from right and justice, and that the jury have found a verdict against the law or against the evidence or without evidence." *Muse* v. *Stern*, 82 Va. 35, 33 Am. St. Rep. 77; *Marshall* v. *Valley R. Co.*, 99 Va. 798, 34 S. E. 455; *Humphreys* v. *Valley R. Co., supra; Morien* v. *Norfolk, etc., Co.*, 102 Va. 622, 46 S. E. 907; *Jackson* v. *Wickham*, 112 Va. 128, 70 S. E. 539; *Bashford* v. *Rosenbaum*, 120 Va. 1, 90 S. E. 625.

The circumstances of the accident are sufficiently set out in *Washington & Old Dominion Ry.* v. *Carter, supra*, and it is only necessary to repeat that it was caused by the removal of a device called a catcher and safety bar, which had been theretofore fixed across the side doors of the postal car, as required by the regulations and instructions of the United States Post Office Department. These bars are put there for use in delivering the mail while the train is in motion as well as for the safety of the postal clerk, whose duties call him to the door for the delivery of mail. This bar had been removed, and when the case was before this court before, it was determined from the evidence then in the record that the plaintiff knew of the removal of the bar and had acquiesced in its removal.

The company claims that the evidence was substantially the same upon the second trial, and that all of the questions involved are concluded by the previous opinion and judgment of this court.

The doctrine of the "law of the case" has been recently stated by this court in *Steinman* v. *Clinchfield Coal Corporation*, 121 Va. 611, 93 S. E. 684, in this language: "Where there have been two appeals in the case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal." And

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also thus: "Again, the doctrine of the 'law of the case' can only be invoked, even between the same parties, where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the 'law of the case' is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts. 26 Am. & Eng. Ency. Law (2d Ed.) 191; *Carper* v. *Norfolk & W. R. Co.*, 95 Va. 43, 27 S. E. 813."

In the case of *Buchner Chair Co.* v. *Feulner*, 28 Ind. App. 479, 63 N. E. 239; *Id.*, 164 Ind. 368, 73 N. E. 816, the plaintiff's arm had been caught and injured by the bit of a boring machine. On the first trial he testified that he was not looking at the bit at the time his arm was caught, and the appellate court reversed the judgment upon the ground that the plaintiff had been guilty of contributory negligence. Upon the second trial the plaintiff explained his former answer, that he was not looking at the bit, by saying this: "I meant I wasn't just looking directly at the bit. I was looking at all of it. I was looking to where I was going to put the piece of wood, and watching the bit as best I could." The court there held that the "law of the case doctrine did not apply, and in the head note this is said: "Where in an action by a servant for injuries, the cause was reversed on appeal on the ground that the plaintiff was guilty of contributory negligence, as shown by his testimony that he was not looking, at the time of the injury, at the piece of machinery which caused the injury, but on the next trial he testified that he was looking at it, the holding on the former appeal was not the law of the case on the next appeal."

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In order to apply this doctrine the facts on both trials must be substantially the same.

This raises the issue now to be determined. It appears from the plaintiff's testimony on the second trial that he did not either know of the removal of the bar or acquiesce therein, whereas it was expressly upon such knowledge and acquiescence that the court, in its former opinion, as noted above, based its conclusion that the plaintiff had been guilty of contributory negligence. Not that there is an irreconcilable conflict between his testimony upon the two trials, but an express denial of knowledge and acquiescence at the second trial which was omitted at the first trial. The company's chief witness testified to facts which, if true, show that the plaintiff did know of the removal of the safety bar, and while there was a conflict between this testimony and that of the plaintiff, there was at the first trial no explicit and positive denial of such knowledge by the plaintiff, though from his account of the transaction his counsel then claimed that upon a fair construction of his testimony it was clear that he did not know of the removal of the bar. This court, however, inferred otherwise, and upon that testimony was of opinion that the plaintiff had been guilty of contributory negligence. It is impossible for us to reach that conclusion now, if the plaintiff's testimony upon the second trial is true, because he clearly, distinctly and positively stated that he did not know that the bar had been removed. So that we have a case in which the evidence upon the second trial as to the plaintiff's contributory negligence was materially different from the evidence upon the first trial with reference to that determining fact, and this issue has been properly submitted to a jury, and the plaintiff has, by the verdict in his favor, been acquitted of the charge of contributory negligence.

It is observed, in passing, that the plaintiff, who was a postal clerk, was a passenger upon the train, and therefore

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entitled to the very highest degree of care from the defendant company. *N. & W. Ry. Co.* v. *Shott*, 92 Va. 34, 22 S. E. 811; *Lindsey* v. *Pa. R. Co.*, 26 App. Cas. (B. C.) 503, 6 Ann. Cas. 863; *Virginia R. Co.* v. *Bell*, 115 Va. 430, 79 S. E. 396, Ann. Cas. 1915a, 804. The negligence of the company, which was alleged to be the proximate cause of the accident—that is, the operating of the postal car without the safety bar—was perfectly apparent upon both trials, and cannot be doubted. The decisive question is whether the recovery should be denied because of the plaintiff's contributory negligence. If he went to the door of the poorly lighted car in the performance of his duties, while the train was in motion, knowing that the safety bar had been removed, and was thrown out of the car because he failed to take proper precautions for his own safety, then it is clear, as appears from the former decision, that he was guilty of such contributory negligence as bars any recovery. On the other hand, if under such circumstances he went to the door of the car, not knowing that the safety bar upon which he had been accustomed to rely had been removed, and without any contributory negligence on his part, sustained the injury complained of, as appears from his testimony upon the second trial, then he is entitled to recover. These opposing theories of the case were submitted to the jury under proper instructions upon the second trial and upon evidence substantially different from that submitted to the jury on the first trial, and the issues having been determined in the plaintiff's favor, the court erred in setting aside that verdict. Therefore, this court will enter the judgment thereon which the trial court should have entered.

Reversed.

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Richmond.

CASEY v. WALKER AND MOSBY.

March 21, 1918.

1. ASSUMPSIT—*When Action Lies.*—*Assumpsit* does not lie in any case except when damages are sought for the breach of a contract, express or implied.
2. AGENCY—*Revocation of Authority.*—If no term of service has been agreed upon, the principal may at any time revoke the authority of his agent, so far as it relates to things to be done and remaining unexecuted, unless the authority is coupled with an interest or conferred for a valuable consideration to the principal.
3. AGENCY—*Revocation of Authority—Power Coupled with an Interest.*—To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power, must be vested in the person to whom the agency, or power, is given, so that he may deal with it in his own name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent. There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation.
4. REAL ESTATE BROKERS—*Commissions on Rented Property—Sale of Property—Case at Bar.*—Defendant, the owner of real property, entered into a verbal contract of indeterminate duration with plaintiff, whereby plaintiff agreed to lease the property for defendant at a three per cent. commission. There was no express stipulation with reference to the collection of rent, yet, in point of fact, plaintiff effected a lease of the premises at $300 per month, which continued for sometime, and received the rent during the entire term, retaining the agreed commissions and paying over the residue to defendant. After the expiration of this lease, no new or different contract was made between plaintiff and defendant, but, with the latter's approval, a ten years lease of the premises was entered into between plaintiff and another lessee at the same rental, and plaintiff collected two months' rent from the new tenant from which he deducted commissions as usual and paid the balance to

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defendant. The defendant then sold the property, thereby terminating plaintiff's agency. Plaintiff knew of defendant's intention to sell the property whenever a purchaser could be found, and interposed no objection when defendant informed him that he had given other agents an option to sell the property.

Held: That the original contract of employment not being for a fixed time, or the agency coupled with an interest, defendant could revoke the powers of plaintiff at will and without incurring liability in damages therefor.

Error to a judgment of the Corporation Court of the city of Lynchburg, in an action of assumpsit. Judgment for plaintiff. Defendants assign error.

Reversed.

The opinion states the case.

Harrison & Long, for the plaintiff in error.

Easley & Coleman and *Volney E. Howard,* for the defendants in error.

WHITTLE, P., delivered the opinion of the court.

In an action of *assumpsit,* the firm of Walker & Mosby, real estate agents, plaintiffs, recovered the judgment under review for $300 against James F. Casey, defendant.

There is no great conflict concerning the essential facts of the transaction out of which this litigation arose, though there is serious diversity of opinion between the parties with respect to their rights flowing therefrom. The material facts are these: Defendant was the owner of storehouse property located on Main street, in the city of Lynchburg, which in the year 1911 was unoccupied. At that time a verbal contract of indeterminate duration was entered into between the parties, whereby plaintiff agreed to lease the property for defendant on a three per cent. commission.

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There was no express stipulation with reference to the collection of rents, yet, in point of fact, plaintiff effected a lease of the premises at $300 per month, which continued until April 30, 1913, and received the rents during the entire term, retaining the agreed commissions and paying over the residue to defendant. So that the contemporaneous construction placed upon the contract by the parties, as evidenced by their course of dealing, was that the duty of collecting the rents devolved upon plaintiff, and it regularly performed that service without questioning its obligation to do so.

After the expiration of the first lease, no new or different contract was made between plaintiff and defendant, but, with the latter's approval, a ten-years' lease of the premises was entered into between plaintiff and another lessee at the same rental, and plaintiff collected two months' rent from the new tenant from which it deducted commissions as usual and paid the balance to defendant. Then it was that defendant sold the property and parted with his domination over it, thereby terminating plaintiff's agency. The happening of that contingency was within the contemplation of the parties and understood by them when the contract of agency was entered into. Plaintiff knew from the time defendant first purchased the property that it was his purpose to sell it, and that he intended to do so whenever a purchaser could be found. With that object in view, the property was exclusively listed by defendant with plaintiff for sale for the first six months of his ownership; and afterwards, until it was finally sold, plaintiff, along with others, had authority to sell it. When defendant informed plaintiff that he had given other agents an option to sell the property, it interposed no objection; and not until after the sale had been consummated did plaintiff make known its contention that defendant was liable for commissions on rents thereafter accruing.

The declaration, in addition to the claim for commissions

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on rents falling due since the sale, sets up a distinct demand for services alleged to have been rendered by plaintiff in connection with certain repairs made by defendant on the property at the instance of the new tenants. Nevertheless, as remarked, the rights and liabilities of the parties were wholly dependent upon and arose out of the original contract, and all services rendered by the plaintiff were in pursuance of its stipulations and within its contemplation and consideration. This appears from the evidence as construed by counsel for plaintiff, who say in their brief: "There was no agreement, or understanding, between them relative to the services to be performed by, or the compensation to be paid to, plaintiffs in connection with the new lease, and they proceeded as if the original agreement was still in force. The plaintiff, Walker, says so. The defendant in his testimony admits it."

In these circumstances, there can be no implied liability resting on defendant to pay this demand. The principle is elementary, that "*Assumpsit* does not lie in any case except when damages are sought for the breach of a contract, express or implied." Burks' Pl. & Pr., 120.

In light of these facts, the original contract of employment not being for a fixed time, or the agency coupled with an interest, defendant could revoke the powers of plaintiff at will and without incurring liability in damages therefor. "When no express or implied agreement exists that the agent shall be retained for a definite time, the power and the right of revocation coincide. Such employments are deemed to be at will merely, and may be terminated at any time by either party, without violating contract obligations or incurring liability. The law presumes that all general employments are thus at will merely, and the burden of proving employment for a definite time rests upon him who alleges it." Mechem on Agency (1 ed.), section 210.

"If no term of service has been agreed upon, the princi-

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pal may at any time revoke the authority of his agent, so far as it relates to things to be done and remaining unexecuted, unless the authority is coupled with an interest or conferred for a valuable consideration to the principal. To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power, must be vested in the person to whom the agency, or power, is given, so that he may deal with it in his own name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent. There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation." 1 Am. & Eng. Ency. of Law (2d ed.), pp. 1216-17-18.

"A power of attorney to collect the rents from a farm on a certain commission may be revoked at the will of the principal, notwithstanding the fact that the agent has made advances under and upon the faith of it, the power not having been conferred as security for such advances, and the agent being under no legal obligation to make them. *Smith* v. *Dare*, 89 Md. 47, 42 Atl. 909. So a power of attorney to collect money for the principal, the attorney to receive as compensation one-half of the net proceeds, is not a power coupled with an interest, and is revocable. *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207. An interest in the proceeds to arise as compensation for executing the power never makes it irrevocable, and a mere power is always revocable at will when it concerns the interest of the principal alone, even though there be an express declaration therein of irrevocability. *Blackstone* v. *Buttermore*, 53 Pa. 266." See also, *Perrow* v. *Rixey*, 119 Va. 192, 89 S. E. 101.

Having thus reached the conclusion that defendant was

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within his rights in revoking plaintiff's agency by a sale of the property, it becomes unnecessary to consider assignments of error in relation to instructions predicated upon a different theory of the law of the case. *Hanger* v. *Commonwealth*, 107 Va. 872, 875, 60 S. E. 67; *Fields* v. *Virginian R. Co.*, 114 Va. 558, 77 S. E. 501; *Perrow* v. *Rixey*, *supra*.

For these reasons, the judgment must be reversed and the case remanded for a new trial (should plaintiff be so advised) in conformity with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY OF INDIANA v. NATIONAL BANK OF COMMERCE OF NORFOLK.

March 21, 1918.

Absent, Prentis, J.

1. DECLARATION—*Assumpsit or Trespass on the Case.*—Where in the caption of a declaration the formal statement is made that plaintiff complains of the defendant "of a plea of trespass on the case," omitting the further words "in assumpsit," but the body of both of the two counts of the declaration allege a contract of carriage and the breach of it as the cause of action, the declaration must be considered as in assumpsit.

2. CARRIERS OF GOODS—*Contract of Carriage—Right of Action.*—In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose, which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, State or Federal, in which case the contract will be implied in law from the duty imposed by the common law or by statute.

3. CARRIERS—*Connecting Carriers—Liability of Initial Carrier under Interstate Commerce Law.*—Congress by the Carmack amendment (34 St. L. 594) has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout. In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one State to a place in another State, beyond your own terminal, you must do so under a contract to transport to the place designated."

4. INTERSTATE COMMERCE—*Carriers of Goods.*—Since Congress has occupied the whole field of interstate commerce by virtue of the interstate commerce act and its amendments, those

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statutes have superseded all State legislation on the subject and they and their construction must be alone looked to in the ascertainment of the rights of parties litigant in all actions, such as that in the instant case, involving an interstate shipment.

5. INTERSTATE COMMERCE—*Connecting Carriers—Liability of Initial Carrier.*—Under the interstate commerce act and its amendments, if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier, en route of the shipment, beyond the terminal of the initial carrier, issues another contract of carriage to the shipper for a remaining portion of the original route and takes up the original bill of lading evidencing the original contract upon its surrender by the shipper, the second contract of carriage does not supersede the first, and in such case the first contract remains in force by virtue of said Federal statute law and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract), have no right of action for damages against such subsequent carrier, but only against the initial carrier. In such case there can be, in contemplation of law, but one initial carrier and no action by the shipper or one claiming under him can be maintained, against any subsequent carrier en route, although instituted upon a subsequent contract of carriage with the latter, such as that aforesaid.

6. INTERSTATE COMMERCE—*Connecting Carriers—Liability of Initial Carrier—Implied Contracts.*—And the same would be true if the initial contract of carriage were not an express contract, but one implied in law because of the duty imposed by the Federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line.

7. INTERSTATE COMMERCE—*Connecting Carriers—Liability of Initial Carrier.*—The doctrine set forth in the two preceding headnotes, however, is based upon the fundamental consideration that in such cases the initial contract of carriage was one which was enforceable by the plaintiff under the Federal statute, as covering the entire route of the original shipment; that any subsequent contract of carriage with any intermediate carrier was needless, was not required in such case by the Federal statute and was against its policy.

8. INTERSTATE COMMERCE—*Connecting Carriers—Liability of Initial Carrier—Tariff Regulation.*—Where owing to a lawful tariff regulation filed with the Interstate Commerce Commission according to law, the shipment of live stock from points west of

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Chicago to points east of that place on shipper's order contract, *i. e.*, on an "order notify" bill of lading, was invalid, the shipper or the consignee might make a second contract of carriage from Chicago to the place of destination of the live stock. Such second contract of carriage is not forbidden by the Interstate Commerce Law and its amendments, and the carrier with whom it is made becomes the initial carrier and is the proper defendant in an action for injury and damage whether caused by its own line or some connecting carrier en route from Chicago to the place of destination of the live stock.

9. CARRIERS—*Interstate Commerce—Tariff Regulation—Validity.*—A tariff regulation filed with the Interstate Commerce Commission according to law, forbade the movement of live stock on shipper's order contract, that is to say, on an "order notify" bill of lading east of Chicago, the regulation applying to all carriage of live stock freight on the lines of all common carriers east of Chicago on "order notify" bills of lading. It was contended that this tariff regulation was unlawful as to shipments of live stock from points west of Chicago orignally destined to points east of that place on "order notify" bills of lading, because such tariff regulation incidentally breaks, interrupts and stops such an originally intended through and continuous interstate carriage of freight.

Held: That as the interstate commerce law permits such a break, stoppage or interruption as may be made in good faith for a necessary purpose and without intent to avoid or unnecessarily interrupt such continuous carriage or to evade the provisions of the interstate commerce act, the tariff regulation was not forbidden by the Federal law.

10. CARRIERS OF GOODS—*Implied Contracts.*—If no express contract had been made with a carrier of live stock and the stock had been received by it for transportation, that state of facts would have constituted it the initial carrier for the entire route under the interstate commerce law as amended, and that carrier could alone have been sued for injury to the live stock en route, notwithstanding any subsequent contract of carriage between the consignee and an intermediate connecting carrier. But in the case at bar such were not the facts, for the live stock had been shipped under a shipper's order contract.

11. CARRIERS OF LIVE STOCK—*Liability—Interstate Commerce Act.*—The initial carrier of live stock, notwithstanding the interstate commerce act and its amendments, is only liable for some default in its common law duty as a carrier or for some default in the like duty of some of its connecting carriers.

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12. CARRIERS OF GOODS—*Liability for Loss of Inanimate Goods—Interstate Commerce.*—At common law, upon the proof merely of delivery to a common carrier of inanimate goods for transportation and the proof of their non-delivery, the law implies that they have been lost by the negligence of the common carrier or by reason of some cause for which it is responsible, and the plaintiff suing for damages occasioned by such loss is relieved of the burden of proof of the cause of the loss. And this rule applies to the initial carrier of inanimate goods under the interstate commerce act and its amendments.

13. APPEAL AND ERROR—*Demurrer to Evidence.*—Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal.

14. CARRIERS OF GOODS—*Burden of Proof—Exception in Contract.*—In an action against a carrier for injury to inanimate goods consigned to it for carriage, where the carrier relies upon a special contract exempting it from liability, the burden of proof is on the carrier to prove that the injury falls within the exception contained in the special contract.

15. CARRIERS OF LIVE STOCK—*Burden of Proof—Exception in Contract.*—In an action against a carrier for injury to a shipment of live stock, where a contract exception is relied on as a defense, the burden of proof, at the least, is on the carrier in two particulars, namely: (a) It must prove that, at the time the injury may have occurred, the special contract exception relied on was in operation; and (b) it must *at least prove* (unless such fact appears from the plaintiff's evidence) that the injury was of such a nature that it may, with equal probability, in accordance with the evidence have been occasioned by causes which were within the contract exception relied on. Certainly this is true where the proof of the plaintiff shows that the injury was due to human agency.

16. CARRIERS OF LIVE STOCK—*Exception from Liability—Evidence—Case at Bar.*—A contract of carriage contained the following exception: "The shipper at his own risk and expense shall load and unload said live stock and in case any person shall accompany said live stock in charge of the same, (shall) take care of, feed and water said live stock while being transported, whether delayed in transit or otherwise * * *." The evidence for plaintiff was that the cars containing the stock were not overcrowded or over-loaded; that the stock was in sound and good condition when delivered to defendant for transportation; that

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the injury to it apparent on its arrival at destination was of such nature that the jury were warranted in drawing the inference of fact that such injury was not occasioned by negligence in loading or unloading or in lack of care of it by any person accompanying the stock in charge of it, or from lack of feed or water. There was evidence for defendant in conflict with that of the plaintiff, but as the case was heard on the demurrer to the evidence, such conflicting evidence could not be considered.

Held: That the defendant had not proved by any evidence before the court that the injury complained of was of such a nature that it might with equal probability have been occasioned by causes which were within the exception from liability clause of the contract relied on by defendant. On the contrary, the evidence for the plaintiff established the affirmative fact that such injury was of such nature that it was not occasioned by causes within the exception.

Error to a judgment of the Law and Equity Court of city of Richmond, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Affirmed.

This is an action of assumpsit by defendant in error (hereinafter called plaintiff) against the plaintiff in error (hereinafter called defendant) to recover damages for loss of certain live stock, consisting of fifty horses and eleven colts. In the caption of the declaration the formal statement is made that plaintiff complains of the defendant "of a plea of trespass on the case," omitting the further words "in assumpsit," but the body of both of the two counts of the declaration allege a contract of carriage and the breach of it as the cause of action and the declaration must be considered as in assumpsit.

The declaration in substance alleges a contract for a through, interstate shipment, entered into between the plaintiff and defendant by which the defendant as a common carrier, for a valuable consideration, undertook and prom-

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ised to take care of and safely carry said live stock from Chicago, Ill., to Windsor, N. C., and to safely and securely deliver such stock to the plaintiff at the last named place; that the plaintiff caused said live stock to be delivered to the defendant at Chicago, Ill., on September 30, 1916, to be so taken care of and carried; that the defendant then and there had and received such live stock for such purposes; and that the defendant disregarded its duty as a common carrier and its said promise and undertaking in that behalf and so carelessly and negligently behaved and conducted itself with respect to said live stock that by and through the mere carelessness and negligence of the defendant and of its servants in this behalf the said live stock was afterwards *"wholly lost"* to the plaintiff (as alleged in the first count), and *"were so badly damaged and injured* that they became and were wholly lost" to the plaintiff (as alleged in the second count of the declaration).

There was a plea of "non-assumpsit" by the defendant, upon which issue was joined, and there was a trial by jury. A letter of plaintiff, treated as a bill of particulars, alleged that "while in transit at Hinton, W. Va., on October 5, 1916, on the line of the Chesapeake and Ohio Railway Company, through negligence of its employees, a number of these horses were killed and the remainder so badly injured as to make them of no value to the owner." After the introduction of the plaintiff's and defendant's evidence, the defendant demurred to the evidence, whereupon the jury found a verdict for the plaintiff, subject to the decision of the court upon the demurrer to the evidence. Thereafter the court overruled said demurrer, entered the judgment complained of in favor of the plaintiff in accordance with said verdict, and the defendant brings error.

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THE FACTS.

Considering the evidence as we must under the rule applicable thereto we find the following material facts to be disclosed thereby.

The contract of carriage alleged in the declaration was proved and shown to have been an express contract in writing made directly between the plaintiff and defendant. It was evidenced by a "uniform live stock contract" in lieu of a "uniform bill of lading," and was both a "receipt" and contract. It was in form made by the defendant with the shipper but was in fact made for the sole benefit of the plaintiff, the consignee—the shipper at that time had no interest in the live stock, having prior thereto assigned and transferred all of his interest therein to the plaintiff.

The contract did not obligate the plaintiff in person or by agent to accompany the stock for the purpose of giving care and attention to it. It did provide, however, that the plaintiff "at his own risk and expense shall load and unload said live stock, and *in case any person shall accompany* said live stock *in charge of the same,* (shall) take care of, feed, and water said live stock transported, whether delayed in transit or otherwise * * *." (Italics supplied.)

The evidence for plaintiff on the latter subject was to the effect that no person accompanied said stock from Chicago en route to Windsor, N. C., "in charge of the same" or as employee or agent of the plaintiff.

The stock was properly loaded on two stock cars, at Chicago, were not over-loaded or over-crowded and were then in sound and good condition in every way as shown by direct and positive testimony for plaintiff. Such situation and condition of the stock was shown to have continued on to a point between Chicago and Cincinnati (not shown precisely what point by the evidence), when a witness for the plaintiff last saw the stock en route.

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There is no evidence in the case for plaintiff or defendant showing the subsequent condition of the stock or what happened to it prior to its arrival at the point of destination, Windsor, N. C.

When the stock arrived at Windsor, N. C., (according to the testimony for plaintiff) it was in such a condition that the jury were warranted in drawing the inference of fact that it had been injured by human agency other than the over-loading or over-crowding of the stock on the cars, or in loading or unloading them, or from lack of care, or feed or water en route.

A portion of the testimony for plaintiff on this subject was as follows: "Some broke their legs, some dying and some had been dying in the car and some very poor, everything had been ruined, couldn't do anything with them, nobody would buy them. * * * broken up * * * All bunged up, all to pieces, and the feet, and the sides, holes where you could get your hands inside in their ribs. Q. What would make a hole like that? A. Where he jammed. Q. How many of those horses were in that condition? A. All of them. There were three good ones. * * whole lot of them dead." By another witness: "* * * they were torn to pieces badly. I recall one had a great piece of flesh torn out of the side of its face. I recall two or three colts and horses had pieces a foot long torn off the legs. There were tears of flesh on the sides. There were a good many of them bruised."

The other evidence from which the jury were warranted in drawing the inference of fact aforesaid, was indirect or circumstantial evidence, but it was ample. It would occupy too much space to recite it here. And such evidence as well as direct testimony for plaintiff as to personal examination of the stock prior to its reaching Chicago, must be taken on the demurrer to the evidence as establishing the fact affirm-

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atively that the damaged condition of the stock as it appeared at Windsor, N. C., was not due to native vice, defects, disease, or fright of the animals or to over-loading or over-crowding of them, or in loading or unloading them, or from lack of care, or feed or water en route.

The acceptance of the shipment at Windsor, N. C., was refused by the plaintiff.

The market value of the stock uninjured as proved by the plaintiff, was ample to justify the amount of the verdict of the jury.

It was disclosed by the evidence for plaintiff that the live stock aforesaid was brought to Chicago on a contract of carriage entered into at Wyoming, evidenced by an "order notify" bill of lading, carrying title to the stock, which was attached to a draft of the shipper on the plaintiff, which was paid by the latter at Norfolk, Va., on September 30, 1916; such bill of lading and title to the stock thus coming to the plaintiff. On that day the plaintiff was informed by telegram received from the bank in Wyoming through which said draft and bill of lading had been forwarded to the plaintiff, that the two cars of live stock aforesaid were held in Chicago on account of "Eastern tariffs prohibiting movement of live stock on shipper's order contract," *i. e.*, on a "order notify" bill of lading, and that such bank had instructed the defendant to "change order and ship direct" to plaintiff, and requested plaintiff to deliver the "order notify" bill of lading it then held "to agent Chesapeake and Ohio Railroad." Accordingly plaintiff that day (September 30, 1916) surrendered such bill of lading to the Chesapeake and Ohio Railway Company at Norfolk, as agent for the defendant, the Chesapeake and Ohio Railway Company of Indiana; and the plaintiff, in effect, thereupon requested the defendant to ship the live stock to it at Windsor, N. C., on the new and different bill of lading or contract of carriage, as was in fact subsequently done by defendant

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as above set forth. That the plaintiff did this because of the information it had received as aforesaid to the effect that defendant would and could not receive the said shipment at Chicago on the "order notify" bill of lading aforesaid, for the reason aforesaid, and because the plaintiff was required to surrender such bill of lading as aforesaid.

The plaintiff did not introduce said order notify bill of lading in evidence, it being no longer in its possession—nor indeed did it introduce the "uniform live stock contract" aforesaid, issued by defendant at Chicago, as the latter had not in fact come into its hands; but the defendant having the former bill of lading and a copy of the latter contract in its possession introduced them both in evidence in connection with its cross-examination of one of plaintiff's witnesses.

The "order notify" bill of lading aforesaid thus introduced in evidence by the defendant, showed on its face that it was given by the Union Pacific Railroad Company at Medicine Bow, Wyoming, on September 24, 1916, and was a contract of carriage between the latter company and the shipper, for the transportation of the live stock aforesaid from that point to Windsor, N. C., *via* Chicago and thence over the line of the defendant, and thence over the same route and lines of connecting carriers as the stock subsequently was in fact carried. This bill of lading was assignable and passed to any subsequent holder of it by assignment from the shipper all the rights of the latter as against the Union Pacific Railroad Company growing out of such contract of shipment or arising from the Federal statute law on the subject. It subsequently, and before the stock was accepted for carriage in Chicago by the defendant, came into the hands of the plaintiff as assignee of said original shipper, as aforesaid.

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The evidence for defendant showed the fact that the said stock was received by the Union Pacific Railroad Company at Medicine Bow, Wyoming, on September 24, 1916, for the through interstate transportation aforesaid; that such contract of shipment was legal and valid for that portion of the route from Medicine Bow, to Chicago, but that because of a regulation of the eastern tariff filed with the Interstate Commerce Commission according to law, which regulation governed all railroads operating east of Chicago, the defendant was not permitted to receive said shipment of live stock at Chicago for transportation from thence to Windsor, N. C., and that for that reason it was not received by the defendant at Chicago for such continued shipment under the "order notify" bill of lading contract.

The "order notify" bill of lading aforesaid contained a provision making it obligatory on the *shipper* to "furnish to go with the stock for" (the purpose of loading and unloading, caring for, feeding and watering it, "until delivery of same to consignee at destination"), "one or more attendants," and further provided that "if the shipper fails to furnish such attendant or if the latter neglects to perform said duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit shall be considered as done at the request and as the representative of the shipper and at the risk and expense of the shipper."

There are two grounds of defence relied on by the defendant, upon appeal, namely:

1. That under the facts of this case the initial carrier was the Union Pacific Railroad Company as fixed by the Federal statute of February 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Anno. p. 809 *et seq.*, designated "an act to Regulate Commerce," as amended by the Carmack amendment, of June 29, 1906, 34 Stat. L. 594, Fed. Stat. Anno. Supp. 1909 p. 273, and by the Cummins amendment of

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March 4, 1915, 38 Stat. L. 1196, Fed. Stat. Anno. Supp. 1916 p. 124, and by act of August 9, 1916, amending the Cummins amendment, that there can be but one initial carrier of an interstate shipment falling within the provisions of said Federal statute law, which alone must be sued for such damages as are claimed in the instant case; that the shipment in the instant case fell within such provisions, and hence that the plaintiff has sued the wrong defendant; that the plaintiff has no cause of action against the defendant in the instant case and hence its demurrer to evidence should have been sustained by the trial court.

2. That, if this be not a sound legal position, under the facts of the instant case it appears that persons accompanied the stock to take care of, feed and water it; that in such case the burden of proof to show the cause of the injury of the stock was upon the plaintiff; that the plaintiff introduced no proof, and there is none in the record, to show that the cause of the injury to the stock was the negligence of the defendant or its connecting carriers, and hence also the demurrer to evidence should have been sustained by the trial court.

The Federal statute law above cited, so far as material, is as follows:

The Carmack amendment, so far as material, reads:

"That any common carrier, railroad or transportation company *receiving property for transportation from a point in one State to a point in another State,* shall issue *a receipt* or *bill of lading* therefor and *shall be liable to the lawful holder thereof* for *any loss, damage or injury to such property,* caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or *regulation shall exempt* such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing

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in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company, on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." (Italics supplied.) (34 Stat. L. 594; Fed. St. Anno. Supp. 1909, p. 273.)

The Cummins amendment, so far as material, reads:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one State or Territory or the District of Columbia, to a point in another State, Territory or the District of Columbia, or from any point in the United States to a point in any adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, *regulation*, or other limitation *of any character* whatsoever, shall exempt such common carrier, railroad or transportation company *so receiving* property for transportation from a point in one State, Territory, or the District of Columbia, to a point in another State, or Territory or from a point in a State or Territory to a point in the District of Columbia, or from

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any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading *or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not,* for the full actual loss, damage or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, *or in any tariff filed with the Interstate Commerce Commission;* and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided, further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided, further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety

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days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (Italics supplied.) (38 Stat. L. 1196, Fed. St. Anno. Supp. 1916, p. 124.)

The provision of the amendment which is added to the Cummins amendment by act of Congress of August 9, 1916, reads:

"Provided, however, that the provisions hereof respecting liability for full actual loss, damage or injury, notwithstanding any limitation of liability or recovery, or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply; first, to baggage carried on passenger trains or boats or trains or boats carrying passengers; second, to property, except ordinary live stock received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to value, be held to be a violation of section ten of this act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby

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empowered to make such order in cases where rates dependent upon and varying with declared or agreed value, would in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules except such as are chiefly valuable for breeding, racing, show purposes, or other special uses." (Italics supplied.)

Section 7 of the interstate commerce act aforesaid which remains unaffected by said amendments provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and *no* break of bulk, *stoppage*, or *interruption* made by such common carrier *shall prevent the carriage of freights from being and being treated as one continuous carriage* from the place of shipment to the place of destination, *unless such* break, stoppage or *interruption* was made *in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.*" (Italics supplied.)

D. H. & Walter Leake and *Henry Taylor, Jr.*, for the plaintiff in error.

Tazewell Taylor, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error present the questions for our

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decision which will be considered and disposed of in their order as stated below:

1. Was the defendant, under the facts of this case, the initial carrier, as contemplated by the Federal statute law above mentioned?

As bearing on this question we will, in the outset, state certain general propositions about which there is no serious question made in argument before us, which are as follows:

In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose, (10 C. J. sec. 130, p. 110); which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, State or Federal, in which case the contract will be implied in law from the duty imposed by the common law or by statute.

It is immaterial therefore whether the action in the instant case was in assumpsit or in tort. The right of the plaintiff to maintain such an action, whether in assumpsit or in tort, depends, in the last analysis, on the existence of a contract of carriage between the plaintiff and defendant, either in fact or implied in law, at the time the alleged cause of action arose, and further upon such contract being an enforceable one under the law.

Prior to the Carmack amendment, above quoted, there were many conflicting decisions as to the circumstances from which the contract on which the right of action depended would be implied at common law, when it was for a through transportation of property designated to a point beyond the terminus of the receiving carrier's line. As said in *Atlantic C. L. R. Co.* v. *Riverside Mills,* 219 U. S. 186, at page 198, 31 Sup. Ct. 164, at page 167, 55 L. Ed. 167, at

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page 179, 31 L. R. A. (N. S.) 7, at page 24: "Congress by the act here involved (the Carmack amendment) has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout." Again, at p. 36, in this opinion of the United States Supreme Court in the case last cited, it is said: "In substance Congress has said to such carriers: 'If you receive articles for transportation from a point in one State to a place in another State, beyond your own terminal, you must do so under a contract to transport to the place designated.'"

Since the Congress has occupied the whole field of interstate commerce by virtue of the Federal statutes aforesaid, those statutes have superseded all State legislation on the subject and they and their construction must be alone looked to in the ascertainment of the rights of parties litigant in all actions, such as that in the instant case, involving an interstate shipment.

Further: The settled construction of the Federal statute law aforesaid is that if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier, en route of the shipment, beyond the terminal of the initial carrier, issues another contract of carriage to the shipper for a remaining portion of the original route and takes up the original bill of lading evidencing the original contract upon its surrender by the shipper, the second contract of carriage does not supersede the first, and in such case the first contract remains in force by virtue of said Federal statute law and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract), have no right of action for damages

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against such subsequent carrier but only against the initial carrier. In such case there can be, in contemplation of law, but one initial carrier and no action by the shipper or one claiming under him can be maintained against any subsequent carrier en route, although instituted upon a subsequent contract of carriage with the latter, such as that aforesaid. *Atlantic C. L. R. R. Co.* v. *Riverside Mills, supra; Looney* v. *Oregon Short Line R. R.*, 271 Ill. 538, 111 N. E. 509; *Hudson* v. *Chicago, etc., R. Co.*, 226 Fed. 38; *W. H. Alton Piano Co.* v. *Chicago, etc., R. Co.*, 152 Wis. 156, 139 N. W. 743; *Atchison, etc., R. Co.* v. *Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050. And the same would be true if the initial contract of carriage were not an express contract, but one implied in law because of the duty imposed by the Federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line. *Hudson* v. *Chicago, etc., R. Co., supra.*

Such holding is based, however, upon the fundamental consideration that in such cases the initial contract of carriage was one which was enforceable by the plaintiff under the Federal statute, as covering the entire route of the original shipment; that any subsequent contract of carriage with any interstate carrier was needless, was not required in such case by the Federal statute and was against its policy, which was (as stated in *Hudson* v. *Chicago, etc., R. Co., supra*), "to secure simplicity in the transportation of freight carried by several common carriers—as the Supreme Court expresses it, 'unity of transportation with unity of responsibility * * * by localizing the responsible carrier,'" (quoting from the case of *Atlantic C. L. R. R. Co.* v. *Riverside Mills, supra*). Further dealing with the question of the proper consideration of the Carmack amendment, the court in the *Hudson* v. *Chicago, etc., R. Co.* case *supra*, said:

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"Now if that is the purpose of the amendment the question arises: Would that purpose be effected by requiring each one, we will say, of seven connecting common carriers in an interstate shipment to issue a separate bill of lading? If this were done we would have, on plaintiff's theory, seven common carriers, six of whom would stand in the position of principals to succeeding carriers, and also six in the position of agents of the preceding carriers. All seven of them would stand in the position of principals so far as their own lines of railway were concerned. Instead of having localized the remedy it would needlessly expand it * * *

"If the Carmack amendment does not compel the intermediate carrier to issue a bill of lading, then the obligation cannot be assumed by the intermediate carrier by the issuance of a bill of lading, for that would be allowing the intermediate carrier to give at its option special privileges to a shipper * * *. So it seems to me that neither in the absence of a bill of lading, nor by issuing a bill of lading, can the intermediate carrier be held liable for loss or damage occurring on the line of the succeeding carrier.

"The first transaction has already settled the relation between the owner of the goods and the carrier and fixed the duties and liabilities of the carrier to such owner. A contract afterwards entered into between the shipper and another carrier manifestly cannot affect these duties and liabilities."

In all of the cases above cited, however, the plaintiff, either as a party to it or as assignee of the shipper who was such a party, could have enforced his claim of damages under the original contract, if the subsequent contract had not been made—there was no stoppage or interruption of the continuous carriage of the freight under the initial contract, made *for any necessary purpose;* hence, the subsequent contract did not fall within the permission given in section 7 of

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the interstate commerce act to make it, and the making of it was in effect prohibited by the Carmack amendment. And subsequent amendments made such prohibition even more explicit. But for such prohibitory effect of Federal statute law, such cases would, of course, have held otherwise than they did, where the subsequent contract of carriage was in fact made without duress.

We come now to the consideration of the controverted question above stated.

The defendant relies on the authorities above referred to to sustain its position that in the instant case the Union Pacific Railroad was the initial carrier and could alone be sued by the plaintiff in the instant case.

The defendant especially relies on the case of *Atchison, etc., R. Co.* v. *Harold, supra,* to sustain the position that a change of consignee does not affect the matter.

As to the last named case the following should be said: Neither change of title to the goods (*Gulf Railway Co.* v. *Texas,* 304 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540) nor change of consignee while the goods are in transit does, of itself, affect the matter; but a change of contract (which is not invalid because prohibited by the Federal statute law aforesaid), by the substitution of a different contract from the initial contract, may affect the matter; and will, and, upon principle, must of necessity do so. For as we have noted above, such an action as that in the instant case can be maintained only as based directly or indirectly upon a contract of carriage existing between the plaintiff and defendant at the time the alleged cause of action arose. If then there was a subsequent contract between the parties to the action which was by them both substituted for a former contract of carriage of the same freight between other parties, and such second contract was not forbidden by law, the action must of necessity be based on the latter contract.

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If indeed the latter contract was forbidden by law and the former contract was by force of statute law continued in existence, then, and then only, the action should be based on the former contract.

The pivotal question, therefore, just at this point in our consideration of the instant case is this: Was the second contract of carriage forbidden by law? This, in turn, depends upon the further question: Was the tariff regulation aforesaid forbidden by the Federal statutes aforesaid, as to shipment of live stock from points west of Chicago to points east of that place?

Now clearly such tariff regulation was not expressly forbidden by said Federal statutes. If forbidden at all it must have been by implication. The tariff regulation applied to all carriage of live stock freight on the lines of all common carriers east of Chicago on "order notify" bills of lading. The tariff regulation was unquestionably legal and valid as to all such shipments originating at and east of Chicago. Its object plainly was merely to abolish "order notify" bills of lading contracts of carriage of the stock in the territory east of Chicago. It is not contended that this object was not in itself lawful. The contention is that the tariff regulation was unlawful as to shipments of live stock from points west of Chicago originally destined to points east of that place on "order notify" bills of lading, because such tariff regulation incidently breaks, interrupts and stops such an originally intended through and continuous interstate carriage of freight. The latter position manifestly depends upon whether the Federal statutes aforesaid forbid any break, interruption or stoppage in every originally intended through and continuous interstate carriage of freight, which has once begun, without exception. Now we see from the provisions of section 7 of such statute law above quoted that this is not so. Such a break, stoppage or interruption as

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may be "made in good faith for * * * (a) necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade the provisions of this act,," is not forbidden by such statute law. We think that the reasonable construction of said Federal statute is that the tariff regulation aforesaid was not forbidden thereby to the extent of the incidental effect aforesaid; that the break, stoppage or interruption at Chicago of the originally intended through transportation from Medicine Bow in the instant case being made not "with any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any provision" of the statute law aforesaid, but solely in order not to interfere with said tariff regulation, it was for a "necessary purpose" in contemplation of such statute. That, therefore, the first contract of carriage in evidence was invalid as a contract of carriage east of Chicago; and, hence, that the second contract of carriage was not forbidden by law but was a lawful and valid contract.

Taking up now the consideration of the cases cited and relied on for defendant as above noted upon the question under consideration, we deem it sufficient to say that the principle on which these cases were decided does not lead to the conclusion that the second contract of carriage in the instant case was forbidden by the Federal statute law. The instant case was not one where the transportation could have proceeded east of Chicago under the first contract of carriage. It was not a case where there was no necessity for a change of that contract into a new and different contract. The invalidity of the first contract under the lawful tariff regulation aforesaid was a sufficient justification of the defendant for requiring a new and different contract of carriage. The latter contract having been in fact entered into, and being a legal and valid contract, it superseded the former contract of carriage.

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It is urged upon our consideration by defendant that the "order notify" bill of lading being illegal as a contract of carriage east of Chicago, it was to that extent a void contract; that a void contract is no contract and that hence the case stands as if no express contract had been made with the Union Pacific Railroad. That in such case the mere receiving of the stock by such railroad for transportation to Windsor, N. C., constituted it the initial carrier for the entire route. This position, however, overlooks the consideration that what we are asked to resolve into a fact by construction was not a fact, and cannot be implied or considered as existing consistently with the actual facts. If, indeed, no express contract had been made with the Union Pacific Railroad Company, and the stock had been received by it for transportation as aforesaid, that state of facts would undoubtedly have constituted it the initial carrier for the entire route to Windsor, N. C.; and the Union Pacific Railroad could alone have been sued by the plaintiff, notwithstanding any subsequent contract of carriage made between the plaintiff and an intermediate connecting carrier. But in such case there would have been no need for any such subsequent contract, the contract implied in law from the duty imposed on the Union Pacific Railroad Company by said Federal statute law would have been ample to have obligated it for the carriage of the freight for the entire route (by itself and through its connecting carriers as its agents). And in such case no connecting carrier would have had the lawful right to refuse such carriage on the ground that it would have been under an invalid contract. But the case before us is, as aforesaid, a very different one.

The conclusion, therefore, necessarily follows that the defendant, and not the Union Pacific Railroad Company, under the facts in the instant case, was the initial carrier as contemplated by the Federal statute law above cited.

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Hence it follows that the defendant was the proper defendant to the action in the instant suit for the injury and damage complained of in the declaration, whether caused by it on its own line or by some connecting carrier en route from Chicago to Windsor, N. C.

Coming now to the question of the liability of the defendant for the injury and damages complained of—it was liable therefor if such injury and damage were due to the negligence or default in duty of the defendant or of some connecting carrier.

That is to say, the defendant, notwithstanding the Federal statute law aforesaid, is only liable for some default in its common law duty as a carrier or for some default in the like duty of some of its connecting carriers aforesaid. *Adams Express Co.* v. *Croninger*, 223 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. In other words, it is liable only for negligence or default in duty at common law of itself, or of its connecting carriers aforesaid, and under the Federal statute law aforesaid is liable for such negligence or default in duty of its connecting carriers as if it were its own and had occurred on its own line. *Galveston, etc., R. Co.* v. *Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516.

Now at common law, upon the proof merely of delivery to a common carrier of inanimate goods for transportation and the proof of their non-delivery, the law implies that they have been lost by the negligence of the common carrier or by reason of some cause for which it is responsible, and the plaintiff suing for damages occasioned by such loss is relieved of the burden of proof of the cause of the loss. This rule applies to the initial carrier of inanimate goods under the Federal statute law aforesaid. *Galveston, etc., R. Co.* v. *Wallace, supra*. As there said "The carrier and its agents (the connecting carriers) having received possession of the

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goods, were charged with the duty of delivering them or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception."

Upon the trial in the court below one of the grounds of defense relied on by defendant was a common law exception, namely: that "The injuries to the animals shown in evidence may as well have been due to the inherent nature, vice or defects of the animals or to * * * fright * * * for which the carriers are not responsible, as to any cause for which the carriers were responsible." But this defense is not relied on before us, and indeed could not be successfully relied on before us for the reason that the evidence for defendant tending to bring the case within such exception was in conflict with the evidence for plaintiff tending to show a contrary state of fact, hence such evidence for defendant was waived by its demurrer to evidence and cannot be considered by us—the result being that we must consider that the defendant has failed to sustain the burden resting upon it, hereinafter referred to, to prove by a preponderance of the evidence that the injury to the stock complained of may have been due to causes within said common law exception relied on by defendant. Therefore, such common law exception need not be further specifically mentioned.

The defendant, however, does, before us, rely on a special contract exception as hereinafter more particularly set forth. Now in connection with the consideration by us of such defense the following should be said:

In the case of loss of inanimate freight it is not questioned by defendant that the common law rule stated in the quotation above from the case of *Galveston, etc., R. Co.* v. *Wallace, supra,* applies, and that the same common law rule

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applies to *injury* and consequent loss or damage arising from *injury* to inanimate freight, and to any defense by such carrier, relying on exemption from liability in damages for *injury* to such freight by reason of any exception to the common law rule provided by contract. The burden of proof in such case is on the carrier to prove that the injury falls within the exception contained in the special contract relied on by the defendant. 6 Cyc. 519, 520; 10 C. J., sec. 577, pp. 574-5.

In the case of animate freight, however, there has been much diversity of opinion as to whether the common law rules applicable to inanimate freight exist in their entirety —whether the same burden of proof aforesaid rests upon the carrier in the event of loss of or injury to animate freight as to inanimate freight.

In considering this question no reference to the statute in Virginia or the rules of decision in Virginia or elsewhere on this subject, with respect to intrastate shipments, would be of any help in arriving at a right conclusion, since the liability for damages in the instant case is governed by the Federal statute law, and the common law rules applicable thereto as accepted and applied in Federal tribunals must govern. *Cincinnati, etc., R. Co.* v. *Rankin,* 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917a, 265. Hence such statutes and decisions will not be referred to.

When we come to consider the common law rules under discussion as accepted and implied in Federal tribunals with respect to injury to animate freight, to-wit, live stock, in a case where a contract exception is relied on as a defense, whatever may be the difference in other of such rules as applicable to animate as distinguished from inanimate freight, there seems to be no room for valid dissent from the conclusion that the burden of proof, at *the least,* which is required of it in that behalf, is on the carrier in two particulars, namely: (a) It must prove that, at the time the injury may

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have occurred, the special contract exception relied on was in operation; and (b) it must *at least* prove (unless such fact appears from the plaintiff's evidence) that the injury was of such a nature that it may, with equal probability, in accordance with the evidence, have been occasioned by causes which were within the contract exception relied on. 6 Cyc. 524; 10 C. J., sec. 581, p. 379. Certainly this is true where the proof of the plaintiff shows that the injury was due to human agency. 6 Cyc. 524.

In the instant case, while there was evidence for defendant to the contrary, there was ample evidence for plaintiff to establish the fact that the injury to the stock complained of was due to human agency, as appears from the statement of facts above, and on the demurrer to evidence this court must consider such as the fact in the instant case.

In the instant case the defendant relies on the special contract exception from liability contained in the contract of carriage with the Union Pacific Railroad, quoted in the above statement of facts, and also on the special contract exception from liability contained in the contract of carriage with the defendant, also quoted in the above statement of facts. Since, for the reason above stated, this action is not based upon the former contract, the exeeption from liability clause thereof cannot be relied on by the defendant. This leaves the defense under consideration entirely dependent upon such clause of the latter contract of carriage.

Now, since the burden of proof at the least which is required of it, as above noted, is upon the defendant in both of the particulars above mentioned, if the defendant has failed in its proof in either particular, such failure is fatal to its defense now under consideration.

It is urged upon our consideration by defendant that the testimony for the plaintiff, when read in connection with certain entries on the contract of carriage with defendant,

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shows that the stock was accompanied by persons in charge of it within the meaning of clause 5 thereof, relied on by defendant, so that such exception clause was put in operation in the instant case, whereas it is urged on the part of the plaintiff that the fact in question is not directly proved but that it is a mere inference, which the defendant, as demurrant to the evidence has deprived itself of the right to draw; but, as we shall presently see, it is unnecessary for us in the instant case to pass upon that controverted question.

Nor is it necessary for us to consider the ground of defense mentioned in the above statement of the case, to-wit, that the burden of proof to show the cause of the injury to the stock was on the plaintiff because the stock was accompanied by persons to take care of, feed and water it. It is not necessary for us to consider such ground of defense because such burden of proof, if it were conceded to exist, did not arise unless the defendant had at least shown by a preponderance of the evidence which can be considered by us that the injury to the stock was of such a nature that it may, with equal probability as aforesaid, have been occasioned by causes which were within the exception from liability clause of the contract aforesaid on which such ground of defense rests. This, as aforesaid, we shall presently see the defendant has failed to do.

The pivotal question then, upon which the defense under consideration turns, and upon which its decision depends in the instant case, is, therefore, the following:

2. Has the defendant sustained the burden of proof resting upon it, at the least which is required of it in that behalf, to show by a preponderance of evidence, (b) that the injury to the stock was of such a nature that it may, with equal probability in accordance with the evidence in the case, have been occasioned by causes which were within the

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exception from liability clause aforesaid of the contract of carriage with defendant?

The exception from liability clause aforesaid of the contract of carriage with defendant, above quoted, is as follows:

"Sec. 5. The shipper at his own risk and expense shall load and unload said live stock and in case any person shall accompany said live stock in charge of the same, (shall) take care of, feed and water said live stock while being transported, whether delayed in transit or otherwise * *."

Now the evidence for plaintiff (as noted in the above statement of facts) was direct and positive that the cars containing the stock were not over-crowded or over-loaded; that the stock was in sound and good condition when delivered to defendant for transportation; that the injury to it apparent on its arrival at destination was of such nature that the jury were warranted in drawing the inference of fact that such injury was not occasioned by negligence in loading or unloading or in lack of care of it by any person accompanying the stock in charge of it, or from lack of feed or water. There was evidence for defendant, it is true, in conflict with that of the plaintiff on this question, but on the demurrer to evidence such conflicting evidence cannot be considered by us. It is, therefore, manifest that in the instant case the defendant has not proved by any evidence which is before us that the injury complained of in the declaration was of such a nature that it may with equal probability, as aforesaid, have been occasioned by causes which were within the exception from liability clause of the contract aforesaid relied on by defendant. On the contrary, the evidence for the plaintiff, as we must consider it, establishes the affirmative fact that such injury was of such nature that it was not occasioned by causes within such exception.

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The question last above stated must therefore be answered in the negative.

For the foregoing reasons, we are of opinion that there was no error in the action of the court below in overruling the demurrer to evidence, and the judgment complained of will be affirmed.

Affirmed.

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Richmond.

CHESAPEAKE AND OHIO RAILWAY COMPANY v. WILLIAMS AND LOUTHAN, RECEIVERS.

March 21, 1918.

1. APPEAL AND ERROR—*Amount in Controversy.*—In an action of assumpsit to recover excess freight charges on creosote, it was entirely competent for the plaintiffs to claim interest or not as they chose, and the trial court was powerless to make them claim it on demand of defendant, there being no evidence of a purpose to defeat the jurisdiction of a court of record by the release of a part of a demand previously asserted. Consequently, where the amount in controversy, without interest, was beneath the jurisdictional limit of the Supreme Court of Appeals, a writ of error must be dismissed as improvidently awarded, unless jurisdiction can be shown on some other ground than the amount in controversy.
2. CONSTITUTIONAL LAW—*State Corporation Commission—Review of Decisions—Section 156 of the Constitution.*—The State Corporation Commission had prescribed no rate on creosote oil in steel drums. The commission had, however, provided that "articles not enumerated will be classified with analogous articles." In an action of assumpsit to recover excess freight charges on creosote shipped from Richmond to Norfolk, the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged.

   Held: That the judgment did not in any way call in question any action of the State Corporation Commission and accordingly was not in contravention of section 156 of the Constitution. If it be conceded that the court plainly erred in its classification, it was an error of judgment in the determination of the rights of the parties, which cannot be reviewed by the Supreme Court of Appeals when the amount in controversy is less than $300.

Error to a judgment of the Hustings Court, Part II, of City of Richmond. Judgment for plaintiff. Defendants assign error.

Writ dismissed.

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The opinion states the case.

D. H. & Walter Leake and *Henry Taylor, Jr.*, for the plaintiff in error.

Gunn & Mathews and *Price & Louthan*, for the defendants in error.

BURKS, J., delivered the opinion of the court.

This is an action of assumpsit to recover excess freight charges on creosote shipped from the city of Richmond to the city of Norfolk, Va. There were a number of shipments, and the plaintiff below claimed in his declaration and in the account filed therewith the sum of $272.16. No interest was claimed in either the declaration or the account, and the damages laid in the *ad damnum* clause of the declaration amounted to only $300. The defendant below claimed that, if the plaintiffs were entitled to recover at all, their claim became due and should bear interest from April 1, 1914, but the plaintiffs at no time claimed interest.

The case was heard by the court, without the intervention of a jury, and the trial court gave judgment for the plaintiff for $272.16 with interest from the date of the judgment. "Thereupon, the defendant, by counsel, requested the court to include in the said judgment interest from April 1, 1914, the date of the account filed with the declaration; but the court, being of opinion that, as the plaintiffs had not claimed interest in their declaration, and the plaintiffs' counsel not asking or claiming interest at the bar of the court, refused to allow the same; to which ruling and judgment of the court defendant, by counsel, excepted."

We see no error in this action of the trial court. It was entirely competent for the plaintiffs to claim interest or not as they chose. The court was powerless to make them

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claim it. There is no evidence of a purpose to defeat the jurisdiction of a court of record by the release of a part of a demand previously asserted, and the case is not within the purview of the cases of *James* v. *Stokes*, 77 Va. 225, and *Hansbrough* v. *Stinnett*, 25 Gratt. (66 Va.) 495. The amount in controversy, therefore, is beneath the jurisdictional limit of this court, and the writ of error must be dismissed as improvidently awarded, unless jurisdiction can be shown on some other ground than the amount in controversy.

It is claimed by the plaintiff in error that the judgment under review is in contravention of section 156 of the Constitution of this State, which declares that "no court of this Commonwealth (except the Supreme Court of Appeals by way of a direct appeal from the action of the Commission) shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority." The judgment under review does not in any way call in question any action of the State Corporation Commission. The article shipped, upon which it is alleged excess freight was charged, was creosote oil in steel drums, for which no rate had been prescribed by the commission. The commission had, however, provided that "articles not enumerated will be classified with analogous articles," and the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged. What is called in the record the Virginia Classification had two rates on creosote or creosote oil. One rate was what was known as a "commodity rate," an exception for a specific article out of the general classification and applicable only to the article mentioned. This was a rate of six and one-half cents for creosote in wood. The other rate was what was known as the "class rate" and was ten cents for creosote *in barrels*. Now barrels are generally made of wood and rarely of any other material, and as the shipments in controversy

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were in steel drums, it was necessary for the trial court to determine which of the two rates was applicable, the commodity rate or the class rate. If it be conceded that it plainly erred in its classification, it was an error of judgment in the determination of the rights of the parties, which cannot be reviewed by this court when the amount in controversy is less than $300. There was no controversy before the Corporation Commission, there was no refusal to obey its mandate; nor was there any denial of its supreme power to fix rates and classifications. Its power to fix rates and classifications were not only not denied, but the case proceeded upon the admission of its power and that it had been exercised. The only complaint that the plaintiff in error can make is that the case was not properly decided. That complaint this court cannot hear unless the amount involved is within the jurisdictional limit of this court. The judgment may not conform to the classification of the commission, but it cannot be said "to review, reverse, correct or annul any act of the commission." If it did, then an appeal would lie to this court in every case where it was alleged that the trial court had erred in the classification of freight, regardless of the amount involved. This cannot be true. If there were no Corporation Commission, and no constitutional provision for such a commission, and the legislature had by act of Assembly made just such a classification as was made by the commission, and this case had been tried under that act and the instant judgment rendered therein, it seems fairly plain that no writ of error would lie from this court, as the judgment is for less than $300. We do not think that the action of the Corporation Commission stands on any higher footing than the act of Assembly would in the case supposed.

For these reasons, we think the writ of error must be dismissed as improvidently awarded.

Writ dismissed.

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Syllabus.

Richmond.

COMMONWEALTH AND OTHERS v. THE TREDEGAR COMPANY.

March 21, 1918.

Absent, Sims, J.

1. TAXATION—*Erroneous Assessment—Injunction.*—Prior to February 24, 1916, the jurisdiction of courts of equity to restrain an illegal or unauthorized tax was well settled in this State. The jurisdiction having once attached, it will survive until destroyed by express statutory enactment; and the mere fact that an adequate remedy at law has been provided by statute does not defeat the jurisdiction.

2. TAXATION—*Erroneous Assessment—Injunction—Acts 1916, page 89—Case at Bar.*—In the instant case the examiner of records for the judicial circuit embracing the city of Richmond reported to the local board of review for that city certain capital alleged to have been omitted from the tax returns of the complainant. At a hearing before the local board of review, the local board rejected the report of the examiner of records, and instructed the commissioner of revenue not to extend the tax upon his books. Thereupon, the Auditor of Public Accounts, with the approval of the State Tax Board, issued written instructions to the commissioner of revenue directing him to disregard the action of the local board and to make the assessment of the alleged omitted capital in accordance with the report of the examiner, which the commissioner did. The complainant then brought this suit in equity for the ultimate and principal purpose of enjoining and restraining the collection of the taxes assessed by the commissioner of revenue. The gist of the proceeding, plainly shown by the prayer of the bill, is to correct and cancel the assessment, to exonerate the complainant from the tax, and to perpetually enjoin its collection. Precisely this relief was available to the complainant by a simple motion at law, under sections 567, 568 and 569 of the Code of 1904.

Held: That the act of February 24, 1916, which provides, "that no suit for the purpose of restraining the collection or assessment of any tax, State or local, shall be maintained in any court of this Commonwealth, except when the party has no

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adequate remedy at law," is conclusive of the instant case. Every possible defense against the assessment which is raised in the equity suit could have been equally availed of in the motion under the statute.

3. TAXATION—*Erroneous Assessment—Remedy—Case at Bar.*—It was contended in the instant case that the only course open to the Commonwealth, after the local board of review had rejected the report of the examiner of records, was an appeal to the Hustings Court of the city of Richmond, and that the subsequent action of the Auditor and the commissioner was null and void. This is a debatable proposition, but even conceding that the contention is sound in so far as the validity of the assessment in question may depend upon the action of the examiner and of the board of review, if the assessment is right in substance, it can be upheld as an independent assessment made by the commissioner under the instructions of the Auditor, without any action on the part of the examiner of records or the board of review.

4. TAXATION—*Assessment—Remedy.*—Under section 508 of the Code of 1904, it is the duty of the commissioner of the revenue to assess for taxation any property which he finds has not been assessed for taxation for any of the previous years within the limits prescribed by that section. If he makes an erroneous or an illegal and invalid assessment, the remedy under section 567 of the Code is adequate, and the previously existing remedy by injunction is cut off by the act of February 24, 1916. The remedy by motion under the statute is prompt and simple, and is peculiarly adapted to a fair and just settlement of disputes of this character between the Commonwealth and its citizens.

Appeal from a decree of the Circuit Court of city of Richmond.

Decree for complainant. Defendants appeal.

Reversed.

The opinion states the case.

Attorney-General J. D. Hank, Jr., Assistant Attorney-General Leon M. Bazile and *H. R. Pollard,* for the appellants.

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W. R. Meredith, for the appellee.

KELLY, J., delivered the opinion of the court.

The examiner of records for the judicial circuit embracing the city of Richmond reported to the local board of review for that city certain capital alleged to have been omitted from the tax returns of the Tredegar Company for the years 1903 to 1911 inclusive. At a hearing before the local board of review, the Commonwealth insisted upon, and the Tredegar Company denied, the correctness of the report of the examiner, with the result that the board rejected the report *in toto,* and instructed the commissioner of the revenue not to extend the tax upon his books. Thereupon, the Auditor of Public Accounts, with the approval of the State Tax Board, issued written instructions to the commissioner of the revenue directing him to disregard the action of the local board and to make the assessment of the alleged omitted capital in accordance with the report of the examiner. The commissioner subsequently made the assessment and extension as directed by the Auditor.

This suit in equity was brought by the Tredegar Company for the ultimate and principal purpose of enjoining and restraining the collection of the taxes assessed as above pointed out by the commissioner of the revenue. The circuit court, hearing the cause upon the bill and exhibits and a demurrer thereto, and being of opinion that the assessment was unauthorized and void, directed the commissioner to strike the same from his books, and decreed that "the defendants (the Commonwealth of Virginia, the city of Richmond and their tax officers) are restrained and enjoined from collecting or attempting to collect said omitted taxes until said defendants shall take an appeal (from the action of the local board of review) to the Hustings Court of the city of Richmond, and it shall be finally determined by the

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court of last resort that such extensions of said taxes are authorized by law, valid and should be collected."

From this decree the present appeal was allowed, and the first question to be decided is, whether a court of equity has jurisdiction of the cause.

Prior to February 24, 1916, the jurisdiction of courts of equity to restrain an illegal or unauthorized tax was well settled by the decisions in this State. *Wytheville* v. *Johnson*, 108 Va. 589, 590, 62 S. E. 328, 18 L. R. A. (N. S.) 960, 128 Am. St. Rep. 981, and cases cited there. The jurisdiction having once attached, it will survive until destroyed by express statutory enactment (*Redd* v. *Supervisors*, 31 Gratt. [72 Va.] 695, 697); and the mere fact that an adequate remedy at law has been provided by statute does not defeat the jurisdiction. *Herring* v. *Wilton*, 106 Va. 171, 175, 55 S. E. 546, 7 L. R. A. (N. S.) 349, 117 Am. St. Rep. 997; *Wytheville* v. *Johnson*, *supra*.

In manifest recognition of these principles, the General Assembly passed an act, approved February 24, 1916, (Acts 1916, p. 89), which provides, "that no suit for the purpose of restraining the collection or assessment of any tax, State or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law." This statute, in our opinion, is conclusive of the instant case. The gist of the proceeding, plainly shown by the prayer of the bill, is to correct and cancel the assessment, to exonerate the complainant from the tax, and to perpetually enjoin its collection. Precisely this relief was available to the complainant by a simple motion at law, under sections 567, 568 and 569 of the Code. If the act of February 24, 1916, is to be given any effect at all, it must be held to apply to this suit. The test of the statute in every case is to be found in the adequacy of the remedy at law. In this instance, every possible defense against the assessment which is raised in the equity suit could have been equally

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availed of in the motion under the statute. Quoting the language of Judge Keith in *Johnson* v. *Hampton Institute*, 105 Va. 319, 326, 54 S. E. 31, 33: "we think the remedy afforded by this statute (Code, sec. 567), which provides for bringing both the citizen and the Commonwealth before the court, is ample and complete to meet all the exigencies of the case presented in the pleadings."

It is earnestly contended that the only course open to the Commonwealth, after the local board of review had rejected the report of the examiner of records, was an appeal to the Hustings Court of the city of Richmond, and that the subsequent action of the Auditor and the commissioner was null and void. This is a debatable proposition, but if we concede that the contention is sound in so far as the validity of the assessment in question may depend upon the action of the examiner and of the board of review, we have no difficulty in holding that if the assessment is right in substance, it could be upheld as an independent assessment made by the commissioner under the instruction of the Auditor, without any action on the part of the examiner of records or the board of review. In other words, we think that under section 508 of the Code, it is the duty of the commissioner of the revenue to assess for taxation any property which he finds has not been assessed for taxation for any of the previous years within the limits prescribed by that section. If he makes an erroneous or an illegal and invalid assessment, the remedy under section 567 of the Code is adequate, and the previously existing remedy by injunction is cut off by the act of February 24, 1916. This, we think, is as it should be. The remedy by motion under the statute is prompt and simple, and, as construed by this court, is peculiarly adapted to a fair and just settlement of disputes of this character between the Commonwealth and its citizens. In *Commonwealth* v. *Schmelz*, 114 Va. 364, 370, 76 S. E. 905, 907, Judge Buchanan said: "Under these provisions of the Code,

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if there has been an error in the assessment complained of to the prejudice of the taxpayer (not caused by his failure or refusal to furnish a list of his property to the commissioner of the revenue) he is entitled to be relieved to the extent of the erroneous assessment. If, on the other hand, the error in the assessment or in the failure to assess his property be to the prejudice of the State, the State is entitled to receive from him the taxes properly assessable against him. In other words, the taxpayer who comes into court under these sections to be relieved from paying more taxes than he claims he ought to pay renders himself liable in that proceeding to pay all taxes with which he is chargeable in that jurisdiction upon a correct assessment of his property. This is the practice in some of the courts of the State, and we think is the proper practice. It is the duty of the party who seeks relief under these statutes (and of all other persons) to pay taxes upon all of his property taxable in the jurisdiction. If he has been improperly assessed on some property and has not been assessed at all upon other property upon which he is assessable with taxes, there is no hardship—indeed, it is only just and equitable—in assessing him with and requiring him to pay all the taxes with which he is assessable in that jurisdiction as a condition to granting him the relief sought. There is no difficulty, in a proceeding like this, to be relieved from an erroneous assessment, for the court to examine into and do all that the commissioner of the revenue is required to do under the provisions of sections 508 and 509 of the Code."

In view of the convenience, elasticity and fairness of proceedings under these statutes, it was doubtless the controlling purpose of the legislature in the enactment of the act of February 24, 1916, to compel a resort thereto whenever the remedy thereunder was adequate. At any rate, the case before us is clearly within the terms of the act and we are of opinion that the circuit court ought to have sustained the demurrer and dismissed the bill.

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The remedy by motion under section 567 of the Code is still open to the appellee, and nothing herein is to be construed as indicating any opinion concerning its right to relief against the assessment.

For the reasons stated, the decree complained of will be reversed, and an order will be entered here sustaining the demurrer and dismissing the bill.

Reversed.

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Syllabus.

Richmond.

DEAN v. DEAN.

March 21, 1918.

1. PLEADING—*Time of Filing and Perfecting—Amendments.*—A very large discretion is vested in the trial courts as to the time of filing and perfecting pleadings, and the Supreme Court of Appeals will not reverse a case unless the action is clearly erroneous and harmful.

2. AMENDMENTS—*Filing Affidavits—Time of—Case at Bar.*—Acts of 1914, page 641, provides that the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended, or supplemental pleading; and that at every stage of the proceeding errors or defects which do not affect the substantial rights of the parties must be disregarded. In the case at bar, plaintiff instituted his action of assumpsit against the defendant as a member of an alleged partnership. Defendant pleaded non-assumpsit, and upon that plea the plaintiff at once took issue, the jury was immediately sworn and the trial proceeded. After all of the evidence had been introduced on behalf of the plaintiff, the greater part of which evidence being for the purpose of proving the alleged partnership, and the plaintiff had announced his case closed, and after the defendant had introduced all of the evidence in his behalf to deny the existence of the alleged partnership, and had announced his case closed, but while both the plaintiff and the defendant, who were the only witnesses in the case, were still in the court room, counsel for plaintiff called the attention of the court to the failure of the defendant to file with his plea the proper affidavit under section 3280, Code of 1904, denying the partnership. Thereupon, on the motion of counsel for the defendant and over the objection and exception of the plaintiff, the court permitted the counsel for the defendant to prepare and file such an affidavit.

Held: Under these circumstances, where neither the evidence nor the facts were certified to the Supreme Court of Appeals so that that court had no facts showing that plaintiff's rights had been injuriously affected, the judgment in favor of the defendant should be affirmed.

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3. AMENDMENTS—*Filing Affidavits—Time of—Case at Bar—Continuance.*—If the plaintiff had indicated to the court that he had been put in a disadvantageous position, or taken by surprise, and had asked the court for a continuance, the court would doubtless have continued the case on his motion. Certainly this should have been done, if it appeared that he had been taken by surprise. Instead of doing this, however, he went on with the trial, contenting himself with a mere exception to the action of the court in allowing the affidavit to be filed, and took his chances before the jury upon the evidence submitted.

Error to a judgment of the Circuit Court of city of Alexandria. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Daniel T. Wright and *T. M. Wampler*, for the plaintiff in error.

Gardner L. Boothe, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The plaintiff, Edward S. Dean, instituted his action of assumpsit against the defendant, Charles A. Dean, as a member of a partnership alleged to consist of the said defendant and one Augustus Dean. On September 16, 1916, when the case matured, the defendant pleaded non-assumpsit, and upon that plea the plaintiff at once took issue, the jury was immediately sworn and the trial proceeded.

Neither the evidence nor the facts are certified, and there was but a single exception taken. That exception grows out of the fact that the defendant failed to file with his plea the proper affidavit under section 3280, denying the partnership.

The record shows that after all of the evidence had been

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introduced on behalf of the plaintiff, the greater part of said evidence being for the purpose of sustaining the contention of the plaintiff that a partnership existed, as alleged in the declaration, between the defendant, Charles Dean, and Augustus Dean, and the plaintiff had announced his case closed, and after the defendant had introduced all of the evidence in his behalf to deny the existence of that partnership, as alleged, and had announced his case closed, but while both the plaintiff and the defendant, who were the only witnesses in the case, were still in the court room, counsel for plaintiff called the attention of the court to section 3280 of the Code requiring such affidavit, and thereupon, on the motion of counsel for the defendant and over the objection and exception of the plaintiff, the court permitted the counsel for the defendant to prepare and file such an affidavit.

It is perfectly settled that a very large discretion is vested in the trial courts as to the time of filing and perfecting pleadings, and that this court will not reverse a case unless the action is clearly erroneous and harmful. In this case it was proper for the court to permit the amendment, and in this connection it is observed that the affidavit was filed on the same day the plea was filed.

In the case of *Whitley* v. *Booker Brick Co.*, 113 Va. 434, 74 S. E. 160, this court decided that it is within the discretion of the trial court at any time before verdict rendered to allow amendments of the pleadings which will operate in favor of justice, and that the rights of the opposite party can always be protected by a postponement of the case, or a continuance, as circumstances may require. Since that case was decided this salutary rule has been embodied in the act entitled "an act to simplify and expedite the administration of justice in this State by the elimination of useless technicalities and vexatious delays and permitting amendments under certain conditions in causes hereafter instituted," which is as follows:

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"Be it enacted by the General Assembly of Virginia, that in any suit or action hereafter instituted the court may, at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended, or supplemental pleading. The court, at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Acts 1914, p. 641.)

If the plaintiff had indicated to the court that he had been put in a disadvantageous position, or taken by surprise, and had asked the court for a continuance, the court would doubtless have continued the case on his motion. Certainly this should have been done, if it appeared that he had been taken by surprise. Instead of doing this, however, he went on with the trial, contenting himself with a mere exception to the action of the court in allowing the affidavit to be filed, and took his chances before the jury upon the evidence submitted. Under these circumstances, and because none of the evidence is certified so that this court has no facts showing that his rights have been injuriously affected, it is clear that the judgment in favor of the defendant upon the verdict should be affirmed.

Affirmed.

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Syllabus.

Richmond.

DERRING'S ADMINISTRATOR v. VIRGINIA RAILWAY AND POWER COMPANY.

March 21, 1918.

1. STREET RAILROADS—*Crossings—Contributory Negligence—Stepping on Track—Case at Bar—Last Clear Chance.*—Plaintiff's intestate was killed by being struck by a car of defendant, an electric interurban railway, which he had intended to board. Defendant's station was on the west side of the tracks and in order to reach it it was necessary for plaintiff's intestate to cross over the tracks. When a short distance from the tracks plaintiff's intestate and his brother, who was accompanying him, heard and saw the car approaching at a distance of 150 to 200 yards from the station. The car was running at a rate of from twenty to twenty-five miles per hour and carried a dim light. Seeing the car approaching, they quickened their speed, and as they approached saw several persons on the station platform signaling the car to stop. The car was scheduled to stop on signal and had uniformly theretofore done so, but on this occasion it neither slackened its speed nor stopped, and in continuing its course struck the intestate, who was attempting to cross the track, inflicting the injury of which he subsequently died. The car was in full view from the time it was first observed at a distance of 150 to 200 yards until the intestate was struck, and the evidence showed that the intestate was looking at the approaching car.

   Held: That the contributory negligence of plaintiff's intestate barred a recovery for his death; and that the doctrine of last clear chance was not applicable.

2. STREET RAILROADS—*Crossings—Contributory Negligence—Stepping on Track—Case at Bar—Last Clear Chance.*—The intestate was laboring under no physical disability. The car was in full view, and he was "looking at the car approaching." The motorman had the right to assume that he would not step in front of it. It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it. The fact that he was a passenger gave him no right to step upon the track in close proximity to the rapidly approaching car.

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8. CARRIERS OF PASSENGERS—*Liability for Injuries—Insurer.*—A carrier is not an insurer of the safety of its passengers.

Error to a judgment of the Circuit Court of Norfolk county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Page, Page & Page and *S. Burnell Bragg*, for the plaintiff in error.

Williams, Tunstall & Thom and *W. P. Marks, Jr.*, for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is an action to recover for the negligent killing of the plaintiff's intestate. There was a demurrer to the evidence by the defendant company which the trial court sustained, and to the judgment sustaining the demurrer this writ of error was awarded. The judgment of the trial court is so plainly right that it would seem unnecessary to do more than merely state the facts.

The plaintiff's intestate and his brother, J. A. Derring, had been fishing near Chesapeake station, in Norfolk county. This station is near Ocean View, on the double-track line of the defendant between Norfolk and Ocean View. The defendant operates an electric interurban and street railway line. The tracks at Chesapeake station run north and south, and the station is on the west side of the tracks. The intestate and his brother were on the east side of the tracks, and it was necessary for them to cross over the tracks in order to board the car for Norfolk. The country is flat and open at this point, the track is straight, and "you can see a long ways down the track." When a

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short distance from the tracks, variously estimated by intestate's brother from "10, 15 or 20 steps" to "20 or 25 yards," they heard and saw the car approaching at a distance of 150 to 200 yards from the station. The car was running at a speed of twenty to twenty-five miles per hour and carried a dim light, or such a light as is generally used in the city, and not a bright headlight. Seeing the car approaching, they quickened their speed to a "lively walking gait," not exceeding four to six miles per hour, and as they approached they saw several persons on the station platform signaling the car to stop. The car was scheduled to stop on signal and had uniformly theretofore done so, but on this occasion it neither slackened its speed nor stopped, and in continuing its course struck the intestate, who was attempting to cross the track, inflicting the injury of which he subsequently died. The car was in full view from the time it was first observed at a distance of 150 to 200 yards until the intestate was struck, and his brother, who was with him at the time of the injury, when asked which way his brother was looking, answered, "It would be hard for me to answer a question like that. Unless a man was a lunatic he would be bound to be looking at the car approaching;" and when asked, "Do you mean he was looking in that direction?" replied, "Of course, he was a man going to cross a track, and he generally looked out for himself. He would be very foolish if he didn't."

It is unnecessary to cite authority to support the judgment of the trial court. The application of the simplest principles to the facts bars recovery. If it be conceded that the intestate was a passenger, and that the defendant was negligent in not having a larger headlight, and in not slowing down or stopping its car at the station, the plaintiff is still not entitled to recover. The intestate was laboring under no physical disability. The car was in full view,

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and he was "looking at the car approaching." The motorman had the right to assume that he would not step in front of it. It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it. The fact that he was a passenger gave him no right to step upon the track in close proximity to the rapidly approaching car. A carrier is not an insurer of the safety of its passengers. Nor do the facts warrant an application of the doctrine of the "last clear chance." The intestate's own negligence is a bar to any recovery for his unfortunate death. Compare *Manors* v. *Detroit United Railways*, 168 Mich. 155, 130 N. W. 664, L. R. A. 1917c, 689; *Va. Ry. & P. Co.* v. *Harris*, 122 Va. , 95 S. E. 403, decided at this term.

The judgment of the trial court is plainly right and must be affirmed.

Affirmed.

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Richmond.

FRIEDLIN v. CROCKIN AND OTHERS.

March 21, 1918.

1. VARIANCE—*Joint Promise.*—The owner of property, through her agent, leased the property to a corporation. Before the lessee corporation took possession under the lease its stockholders determined to dissolve the corporation, and the agent of the lessor was notified that the property would not be occupied under the lease. The lessor claimed that one of the stockholders of the corporation verbally promised the plaintiff's agent that he and the other two stockholders of the corporation would be responsible for the rent until another tenant could be found for the property. The lessor then brought suit against the stockholders as individuals upon the joint promise of the stockholders to be responsible for the rent.

   Held: That the trial court properly instructed the jury that unless the promise was made jointly by all of the defendants, the plaintiff could not recover jointly against all, and the evidence failing to establish such joint promise, the court committed no error in setting aside a joint verdict against all the defendants.

2. FRAUDS, STATUTE OF—*Promise to Answer for Debt of Another.*—In the case at bar, the alleged promise or promises by the individual stockholders to pay the debt of the corporation was or were collateral and not original, and under the statute of frauds (Code of 1904, section 2840), no action can be brought upon a promise to pay the debt of another unless the promise be in writing signed by the party to be charged thereby or his agent. The plaintiff did not release the corporation, the original debtor, from its obligation, nor did she release or waive any of her legal rights to subject the assets of the corporation to her debt, nor was she asked to do so, and the case is clearly within the letter and reason of the statute.

Error to a judgment of the Hustings Court of city of Portsmouth, on a motion for judgment for money. Judgment for defendant. Plaintiff assigns error.

Affirmed.

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The opinion states the case.

S. Burnell Bragg and *Pender & Way* and *Foreman*, for the plaintiff in error.

Jno. W. Happer and *Frank L. Crocker*, for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

This controversy arises out of these circumstances: The plaintiff in error, through her agent, Charles R. Welton, leased certain property in the city of Portsmouth to Nathan Crockin, Incorporated, from July 1, 1912, to December 31, 1914, for $75.00 per month. At the time of the lease another tenant, who was not ready to vacate on July 1, 1912, occupied the property, and by consent was permitted to hold it until September 1, 1912. In the meantime the lessee had determined to give up its business, the stockholders had determined to dissolve the corporation, and the agent of the lessor was notified that the property would not be occupied under the lease.

For the plaintiff it is claimed that Nathan Crockin, one of the defendants, verbally promised the plaintiff's agent that he and the other two stockholders of the corporation, Haskell and Lewis, would be responsible for the rent until another tenant could be found for the property. It is upon this alleged promise that this notice of motion for judgment is based. The jury found a verdict in favor of the plaintiff for the amount claimed, which verdict the court set aside as contrary to the law and the evidence, and upon the second trial the plaintiff offered no evidence and there was a verdict and judgment for the defendants.

The plaintiff in error is here claiming that the court

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erred in setting aside the first verdict, and that she is entitled to judgment thereon.

The defendants are sued as individuals upon a joint promise, so that the plaintiff can recover against them jointly only in the event that a joint promise is proved. The defendants deny making either a joint or several promise. The evidence of the plaintiff not only fails to sustain such a joint promise, but clearly shows that there was no such joint promise. On the first occasion on which the promise is alleged to have been made by Crockin, one of the defendants, to Welton, agent of the lessor, neither Lewis nor Haskell was present. While there are certain expressions in the testimony of Welton, which, considered alone, might be construed as a promise by Crockin that the three would pay the rent, still his evidence, as a whole, fairly construed, only tends to prove that Crockin promised for himself to pay or to see that one-half of the rent was paid, and that the other half would be paid by the other defendants; but there is no effort to show that he then had any authority to speak for the other defendants, or that there was any consideration therefor. There was another interview in March, 1913, caused by complaints that the rent was not being promptly paid, at which interview Crockin, Haskell and Mrs. Holmes, a sister of the lessor acting as her agent, were present at Welton's office, and Welton was present part of the time. From the evidence of the plaintiff's own witnesses, as to this interview, it clearly appears that the former agreement that Crockin was to be responsible for half of the rent, and that Haskell and Lewis were to pay the other half was confirmed, and Welton, the plaintiff's witness, and rental agent, testifies distinctly, positively and repeatedly that they did not promise to pay it jointly, but that Crockin and Haskell each severally promised to pay $37.50 per month. The corporation dissolved in July, 1913, and no rent accruing after July 15, 1913, was paid. It

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appears that the assets of the corporation were applied to the payment of this as well as of its other debts, and that all of the other debts were paid in full except this one.

1. The court upon the first trial properly instructed the jury that unless the promise was made jointly by all of the defendants, the plaintiff could not recover jointly against all, and the jury having disregarded this instruction and found a joint verdict against all of them, the court committed no error in setting it aside.

2. The action cannot be maintained for another reason. The alleged promise or promises by the individual stockholders to pay the debt of the corporation was or were collateral and not original, and under the statute of frauds (Code, section 2840) no action can be brought upon a promise to pay the debt of another unless the promise be in writing signed by the party to be charged thereby or his agent. The plaintiff did not release the corporation, the original debtor, from its obligation, nor did she release or waive any of her legal rights to subject the assets of the corporation to her debt, nor was she asked to do so, and the case is clearly within the letter and reason of the statute. *Waggoner* v. *Gray's Adm'r*, 2 Hen. & M. (12 Va.) 603; *Cutler* v. *Hinton*, 6 Rand. (27 Va.) 509; *Ware* v. *Stephenson*, 10 Leigh (37 Va.) 161; *Noyes* v. *Humphreys*, 11 Gratt. (52 Va.) 636; *Engleby* v. *Harvey*, 93 Va. 444, 25 S. E. 225; 20 Cyc. 172; *Hurst's Hardware Co.* v. *Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912 B, 218; *Fields* v. *Bullington*, (Ga. App.) 92 S. E. 653; 20 Cyc. 172, 186.

In our view the dissenting opinion is based upon a misconception of the facts disclosed by the record.

The court properly exercised its discretion in setting aside the first verdict, and the case having been rightly determined, the judgment will be affirmed.

Affirmed.

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SIMS, J.: dissenting.

I cannot concur in the majority opinion in the view there taken of the issue in controversy or of the facts of the case.

As appears from the notice of motion instituting the action, the contract sued on was not the lease to Nathan Crockin, Inc., but a subsequent contract alleged in such notice to have been entered into by the defendants, "on or about the * * * day of August, 1912," by which they "for valuable consideration agreed to pay the rent for the aforesaid premises in accordance with the terms, conditions and covenants of a certain written lease between Nathan Crockin, Incorporated, a corporation and (the plaintiff) said lease being dated on or about January 26, 1912, until such time as you (the defendants) succeed in renting the said premises for the balance of the unexpired term to a tenant satisfactory to me." Such subsequent contract sued on, as appears from such notice, was not an assumption of the lease to the corporation aforesaid, nor a promise to pay the debt or obligation of such corporation. It was a new and independent contract entered into between the plaintiff and defendants, supported by valuable consideration therefor, as alleged in the notice. It is true the notice refers to the lease to the said corporation but it does so merely as containing a statement of the "terms, conditions and covenants," in accordance with which the contract sued on bound the defendants, "until such time as defendants should succeed in renting the said premises for the balance of the unexpired term (the time mentioned in such lease) to a tenant satisfactory to" the plaintiff.

Accordingly, during the progress of the first trial of the case, it clearly appears that the position of the plaintiff was that the evidence showed the existence of the contract sued on as aforesaid independently of the lease aforesaid, except only as that was referred to as evidencing "the terms, con-

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ditions and covenants" aforesaid of the contract sued on during the life of the latter.

And, in my view of it, there was sufficient evidence in the case for plaintiff to support the verdict of the jury on the first trial, which found, in effect, that the joint contract sued on was in fact entered into by all of the defendants as alleged in plaintiff's notice of motion aforesaid. This being a minority opinion, no useful purpose would be served by setting out in detail my view of the evidence, or by any discussion of it. It is deemed sufficient in this dissenting opinion to make the following further statement of the conclusions I reach on certain questions of fact and of my view of the law as applicable thereto:

The evidence, as I view it, shows that upon the faith of said joint contract the plaintiff looked only thereto and gave up any assertion of claim against the Nathan Crockin, Inc., of liability of such corporation to her under said lease, and the plaintiff allowed the stock of goods belonging to such corporation to be taken into possession by Lewis & Haskell and to be sold out by the latter without asserting any claim for rent against such goods under the aforesaid lease to the said corporation. This change of *status quo ante* of the plaintiff to her detriment, was a sufficient valuable consideration to support the said contract which was sued on. *Hamer* v. *Sedway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; Clark on Contracts (3d ed.) p. 134; *Halsey* v. *Peters' Ex'r*, 79 Va. 68.

Further: The evidence for plaintiff in the instant case, as I view it, shows, the testimony for defendants admitted, that the three defendants were the stockholders of the aforesaid corporation, that Crockin in August, 1912, when the contract sued on was alleged to have been made, was negotiating but had not concluded the sale of his interest therein to Lewis & Haskell. They were all three at that time, therefore, interested in freeing the corporation from

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liability to the plaintiff under the lease aforesaid to the corporation to accomplish the non-assertion of such liability by the plaintiff against the assets of the corporation, as was in fact accomplished by the making by defendant of the new contract which was sued on according to the testimony for plaintiff, was a sufficient valuable consideration to support such contract. See 15 L. R. A. (N. S.) 222, and note on "Interest of Promisor;" also 29 Am. & Eng. Ency. L., 928-930.

For the foregoing reasons I am constrained, with the utmost deference, to dissent from the majority opinion of the court.

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Richmond.

HECHLER'S EXECUTRIX v. KEMP, TREASURER.

March 21, 1918.

1. COUNTIES—*School Districts—Recovery of Money Belonging to County Retained by Treasurer.*—Upon the annexation of part of the territory of Henrico county by the city of Richmond, of the sum decreed to be paid by the city to the county in compensation for the land and property taken, $133,158.63 was the ascertained value of certain property held by several of the district school boards of the county. The entire amount due by the city for all territory and property taken over was decreed to be paid to the county, and was received by the county treasurer. By resolution of the board of supervisors the treasurer was directed to place to the credit of each of the district school boards its proportionate part of the fund received by the county from the city on account of the school property taken. This entire fund decreed to be paid to the county of Henrico was in terms included in section 862, Code of 1904, by the designation of "all money belonging to the county," and was recoverable on motion under section 865, Code of 1904. The apportionment among the several district school boards of that part of the fund which represented the purchase price of county school property was proper and within the authority of the board of supervisors to direct. In the absence of such apportionment, unquestionably the failure of the treasurer to pay over this money to his successor in office would have been a breach of official duty for which he and his surety would have been liable, and the fund would have been recoverable for the use of the county by motion in the mode prescribed by section 865, Code of 1904. And it is equally clear that after apportionment, it was so recoverable for the use of the several district school boards.
2. COUNTIES—*School Districts—Recovery of Money Belonging to County Retained by Treasurer—Construction of Section 865, Code of 1904.*—The language of section 865 is too plain to call for construction. It declares, in such cases, that the motion shall be brought "at the relation of his successor, for the use of * * * the county, district, county school board, or district

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school board, as the case may be * * *." The fund in dispute being moneys required by section 862 to be paid by the retiring treasurer to his successor in office, it is recoverable on motion brought in the name of the successor in office of the retiring treasurer, suing at the relation of and for the use of all the district school boards interested in the controversy, against the former treasurer and the surety on his official bond.

3. COUNTIES—*Remedy Against County Treasurer—Construction of Section 865, Code of 1904.*—The statute is remedial and even if doubtful should be liberally construed in furtherance of the remedy. But it is too plain to render the application of this rule of construction necessary.

4. COUNTIES—*Treasurer—Remedy Against—Construction of Sections 862 and 865, Code of 1904—Construction of Statutes in Pari Materia.*—Sections 862 and 865, Code of 1904, are contained in chapter 87 of the Code, which deals with the duties of county and city treasurers, and prescribes remedies against them and their bondsmen for the breach of such duties. The two sections bear reciprocal relations to each other, and to some extent are interdependent. In these circumstances they must be considered together to maintain congruity of construction and to make the provisions of both effectual. For it is a general rule of construction of statutes, that, as far as practicable, whatever is necessary to give them efficiency should be supplied.

5. COUNTIES—*Treasurer—Compensation.*—Code of 1904, section 1449, as amended by Acts 1908, chapter 309, provides that the county treasurer unless otherwise specially provided, shall receive such compensation as the county school board may determine for handling school funds; provided, that the same shall not be more than one per centum upon the amount received.

Held: That this provision goverened the compensation a county treasurer was entitled to, where the treasurer was directed by resolution of the board of supervisors to place to the credit of each of the district school boards its proportionate part of a fund received by the county from the city on account of the school property taken by the city in annexation proceedings, and fixing the compensation of the treasurer at one-fourth of one per cent.

Error to a judgment of the Circuit Court of Henrico county, on a motion for judgment for money. Judgment for plaintiff. Defendant assigns error.

Affirmed.

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The opinion states the case.

Byrd, Fulton & Byrd, Munford, Hunton, Williams & Anderson, Brockenbrough Lamb and *Gunn & Mathews,* for the plaintiff in error.

W. W. Beverley and *F. T. Sutton, Jr.,* for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

In outline, the facts material to a proper review of the judgment complained of on this writ of error are as follows: In the year 1914, in legal proceedings instituted for that purpose, part of the territory of Henrico county was annexed to the city of Richmond. Of the sum decreed to be paid by the city to the county in compensation for the land and property taken, $133,158.63 was the ascertained value of certain property held by several of the district school boards of the county. The entire amount due by the city for all territory and property taken over was decreed to be paid to the county, and was received by Henry C. Hechler, county treasurer, by virtue of that decree. By resolution of the board of supervisors the treasurer was directed to place to the credit of each of the district school boards its proportionate part of the fund received by the county from the city on account of the school property taken and the school indebtedness assumed by the latter in the annexation proceedings. The treasurer, after deducting a commission of five per cent. on the first $25,000 and three and one-half per cent. on the residue, deposited the remainder of the $133,158.63 to the credit of the respective district school boards. The county school board, pursuant to authority vested in it by section 1449 of the Code, fixed the compensation of the treasurer for the foregoing ser-

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vice at one-fourth of one per cent. Subsequently, the school board of one of the districts brought its motion against Hechler, former treasurer (his term of office having expired), suing at the relation of the successor in office of the retiring treasurer, to recover its proportion of the difference between the rate of commission fixed by the county school board and the higher commission retained by Hechler.

This motion was dismissed on demurrer, the trial court holding that there was no statutory warrant in such case for that form of procedure. Thereupon, the present motion was brought in the name of L. H. Kemp, treasurer of Henrico county (successor in office of Henry C. Hechler, former treasurer), suing at the relation of and for the use of all the district school boards interested in the controversy, against Hechler, former treasurer, and the National Surety Company, a corporation, surety on his official bond, to recover the alleged excess of commissions. Hechler interposed a general demurrer to the motion, which was overruled, and the case continued. Before the next calling of the case Hechler died, and the motion was revived against his executrix. On her motion, the previous order overruling the demurrer was set aside, and leave was granted to her to file a demurrer, which was likewise overruled, and also the motion of the National Surety Company to dismiss the motion as to it. The trial on the merits resulted in a verdict for the plaintiffs, upon which the judgment under review was rendered.

The two questions that claim our attention are: (1) Have defendants in error (plaintiffs below) adopted the proper procedure, and (2) To what commission was the treasurer entitled in the circumstances narrated?

1. The solution of the first proposition depends upon the scope and correct interpretation of section 862 of the Code,

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read in connection with section 865. Both sections are found in chapter 37, which deals with the duties of county and city treasurers, and prescribes remedies against them and their bondsmen for the breach of such duties. The two sections bear reciprocal relations to each other, and to some extent are interdependent. In these circumstances they must be considered together to maintain congruity of construction and to make the provisions of both effectual. For it is a general rule of construction of statutes that, as far as practicable, whatever is necessary to give them efficiency should be supplied.

We quote so much of section 862 as bears upon this controversy: "He (the county treasurer) shall receive the county levy in the manner prescribed for the receipt of the State revenue, and shall * * * settle with said supervisors his account for that year; and out of the balance shown to be in his hands upon said settlement he shall at once pay all warrants drawn on the levy for that year not previously paid * * * and when his term of office expires, or if he die, resign, or be removed from office, he, upon the expiration of his term of office, resignation, or removal, or his personal representative upon his death, shall immediately make such settlement, showing the amount in his hands to be accounted for, and the fund to which the same belongs, and deliver to his successor all bonds, books and papers belonging to his office, *and all money belonging to the county.*" Italics supplied.

We also quote from section 865 what is pertinent to this inquiry: "For every breach of the condition of the bond of the treasurer * * * either in failing to account for and pay into the treasury all taxes due from him to the State, or to pay over to his successor all moneys required by section eight hundred and sixty-two to be paid to his successor in office when he goes out of office, suit may be

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brought against such treasurer and his sureties on his official bond in the first case * * * for the use of the State, or in the second case, at the relation of his successor, for the use of the city, county, district, county school board, or district school board, as the case may be, or the same, together with damages and costs as prescribed by section eight hundred and sixty-three, may be recovered by motion in said courts. A motion under this section shall be after at least five days' notice, and when on behalf of the Commonwealth, shall be in the name of the Commonwealth, and in all other cases in the name of the successor in office of such treasurer."

As we have seen, the entire fund arising out of the annexation proceedings was decreed by the circuit court to be paid to the county of Henrico; and by that decree was impressed with the character of money belonging to the county. Such fund is, therefore, in terms included in section 862, by the designation of *"all money belonging to the county,"* and was recoverable on motion under section 865.

Notwithstanding its title to the whole fund, the county recognized the fact that the part of it which represented the purchase price of county school property should be apportioned among the several district school boards in just proportion; and by its board of supervisors directed the treasurer to place to the credit of each its share of the fund. The duty imposed by this resolution was recognized by the treasurer and duly performed, except with respect to the alleged excess of commissions retained by him. We have no doubt of the propriety of the foregoing apportionment, or of the authority of the board of supervisors to direct it. In the absence of such apportionment, unquestionably the failure of the treasurer to pay over this money to his successor in office would have been a breach of official duty for which he and his surety would have been liable, and which would have been recoverable for the use of the county by motion

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in the mode prescribed by section 865. And it is equally clear that after apportionment, it was so recoverable for the use of the several district school boards. The language of section 865 is too plain to call for construction. It declares, in such cases, that the motion shall be brought "at the relation of his successor, for the use of * * * the county, district, county school board, or district school board, as the case may be. * * *" The fund in dispute being moneys required by section 862 to be paid by the retiring treasurer to his successor in office, we should have to strike out of section 865 the words, "the district school board" to sustain the contention of plaintiffs in error. The statute is remedial, and even if doubtful should be liberally construed in furtherance of the remedy. But it is too plain to render the application of this rule of construction necessary.

2. This brings us to a brief consideration of the question of the amount of commission to which the treasurer was entitled.

We are of opinion that section 1449, as amended by Acts 1908, controls the question of the amount of commissions which he had the right to retain for handling the school funds in annexation proceedings. Before the amendment, the then Attorney General of the Commonwealth, Hon. William A. Anderson, was called on by the superintendent of public instruction to advise him to what commission, if any, the county treasurer was entitled for receiving and disbursing the fund in circumstances identical with those existing in the present case. For reasons stated in his letter of December 30, 1907, he gave it as his opinion that no provision was found in the statutes on the subject, and that it was "*casus omissus* in the laws." See Annual Rep. of the Attorney General (1908), pp. 22, 23. Following that opinion, the legislature in 1908 amended section 1449, presumably to supply the omission to which the Attorney General had drawn attention. The amendment of section 1449

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omitted the words "by the provisions of this chapter," and substituted the words "placed under the control of a county or district school board." The original section provided what commissions a treasurer should receive for handling school funds placed in its hands "by the provisions of this chapter" and did not include moneys arising from annexation proceedings, while the added words included funds paid for school property taken in such proceedings, and section 1449, as amended, fixed the commission of the treasurer for services in such case. Accordingly, the same learned Attorney General, replying to a similar letter from the Superintendent of Public Instruction, in the Campbell county annexation case, under date February 1, 1909, replied: "It seems to me that section 1449 of the Code, as amended by the act of March 14, 1908, Acts 1908, p. 553 (compilation of Virginia School Laws, section 88, p. 25) governs the question of the compensation to be allowed the treasurer of Campbell county for receiving and disbursing the $5,000.00 turned over to him by the treasurer of Lynchburg on account of the value of the school buildings in that portion of Brookville district of Campbell county which has been recently annexed to that city. * * *" See Annual Reports of the Attorney General, 1903-1913 (1909), p. 39.

In the light of the history of the amendment of section 1449 by the act of 1908, we cannot doubt the correctness of the learned Attorney General's conclusion, that the amended section controls the question of the treasurer's commissions in the instant case.

The amended section reads: "Section 1449. *Duties of county treasurer as to school funds: his pay.*—The county treasurer shall, in all cases, collect and disburse or invest the funds placed under the control of a county or district school board and all moneys coming into the hands of said boards in accordance with the direction of the board controlling the fund, and, unless otherwise specially provided,

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shall receive such compensation as the county school board may determine: provided, that the same shall not be more than one per centum upon the amount received. For the proper application of all such funds he and his sureties upon his official bond shall be liable." Acts 1908, p. 553.

The county school board in exercise of authority vested in it by the above section, fixed the commissions at one-fourth of one per cent.; and the verdict and judgment under review were for the difference between the commissions retained by the treasurer and those allowed by the county school board.

The conclusion having been reached that the judgment on these controlling issues is plainly right, it is unnecessary to notice subordinate assignments of error, which in no event could affect the result.

Affirmed.

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Richmond.

KELLAM V. BELOTE.

March 21, 1918.

1. LANDLORD AND TENANT—*Tenancy from Year to Year—Notice to Quit.*—To terminate a tenancy from year to year a notice to quit by the landlord to the tenant must be unconditional. In the instant case, there was no unconditional notice to vacate. The notice proposed a different kind of rent, or a renting for a part of the crop instead of a fixed money rent, and to this proposition the tenant replied, "he would do what was right." This was not a sufficient notice to terminate the tenancy.
2. LANDLORD AND TENANT—*Tenancy from Year to Year—Notice to Quit—Waiver.*—It appeared from the evidence that in the case at bar the tenant was in the habit of getting drunk, and after the notice to vacate the landlord sent him word "to stop drinking whiskey and go ahead as he had been doing."

   Held: That if the notice had been a sufficient notice it was waived by this message.
3. LANDLORD AND TENANT—*Waiver of Notice to Quit—Notice to Purchaser—Demurrer to Evidence.*—In the case at bar plaintiff claimed that he was a purchaser for value from the landlord and had no notice of the waiver of notice to quit, but he knew of the tenancy from year to year and of the character of the notice that was given to terminate it, and, viewing the case as on a demurrer to the evidence, he had notice of the waiver, as a witness testified that he repeated the message of the landlord as to the tenant's stopping drinking and going ahead to the tenant in the presence of the plaintiff.

Error to a judgment of the Circuit Court of Accomac county, in an action of unlawful detainer. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

S. J. Turlington, Jeffries & Jeffries and *Geo. L. Doughty, Jr.*, for the plaintiff in error.

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Mapp & Mapp, for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is an action of unlawful detainer brought by the plaintiff in error against the defendant in error to recover the possession of a tract of one hundred acres of land. There was a verdict and judgment for the defendant, and the plaintiff assigns error. Several errors are assigned to the rulings of the trial court on the admissibility of testimony and on the granting and refusing of instructions, but we deem it unnecessary to consider them as we are of opinion that no other verdict could have been found than was found, even if the rulings complained of had been favorable to the plaintiff in error.

Under the provisions of section 3484 of the Code, the case is to be considered as on a demurrer to the evidence by the plaintiff in error. So considering it, the case is as follows: The defendant was a tenant from year to year of William T. Benson, and had been such tenant for several years. In June, 1916, Benson caused a written notice to be prepared, to the defendant, which was served on him by the plaintiff in error on the last day of June, 1916. This notice is not copied into the record and there is some doubt as to its contents; but the plaintiff himself testifies that he served the notice on the defendant, and when asked the following question: "Mr. Kellam, did you state to him that 'this don't mean for you to leave, Will, it is changing the rent from money to a share,'" he replied: "I told Mr. Belote that day that my understanding was that he could rent the place for one-third, but that he could not have it for $350.00," which was the amount he had formerly been paying for rent. The plaintiff further testifies that in response to this statement Belote said, "he would do what

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was right." It sufficiently appears, therefore, from the testimony of the plaintiff himself that there was no unconditional notice to vacate. It proposed a different kind of rent, or a renting for a part of the crop instead of a fixed money rent, and to this proposition the defendant replied, "he would do what was right." This was not a sufficient notice to terminate the tenancy.

In *Baltimore Dental Association* v. *Fuller,* 101 Va. 627, 44 S. E. 771, it was decided that a notice to terminate a tenancy of this kind must be explicit and positive; that a conditional notice is not sufficient, and that a notice to a tenant that unless certain repairs were made and assurances given, the landlord would not renew the lease, was a conditional notice and not sufficient to terminate a lease from year to year. The case in judgment comes within this principle. But even if the notice had been sufficient, it was subsequently waived. It does not appear that Benson and the defendant had any other dealings with each other except the renting of this land. It does appear, however, that the defendant was in the habit of getting drunk, and that about a week after the notice was given Benson sent a message to the defendant by G. W. Barrett. The latter testifies that Benson said to him: "You talk to Will about his drinking. You tell Will to stop drinking whiskey and go ahead as he had been doing." This message the witness says he delivered to the defendant three or four days thereafter. The witness further testifies that he thereafter repeated this message in the presence of the plaintiff and of Benson and the defendant, and that witness "gathered that he meant for him to stay at the farm." Subsequently, on September 30, 1916, Benson conveyed this land to the plaintiff in error, who brought this action January 1, 1917. He claims that he was a purchaser for value and had no notice

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of the waiver, but he knew of the tenancy from year to year and of the character of the notice that was given to terminate it, and, viewing the case as on a demurrer to the evidence, he had notice of the waiver.

We are of opinion that there is no error in the judgment of the trial court, and it is, therefore, affirmed.

Affirmed.

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Richmond.

KILLAM v. NORFOLK AND WESTERN RAILWAY COMPANY.

March 21, 1918.

1. PUBLIC SERVICE CORPORATIONS—*Private or Public Capacity.*—A public service corporation may act in a private capacity, as distinguished from its public capacity.
2. EMINENT DOMAIN—*Public Service Corporations—Public Capacity.*—If a public service corporation in locating, constructing or changing the construction, and in the operation of its works, acts in its public capacity, general legislative authority given it so to do, when strictly pursued, unless that authority is limited or annulled by constitutional provision (whether the provision of the Virginia Constitution of 1902 on the subject of private property being damaged for public uses without just compensation does or does not so limit such authority, it was not necessary to determine in the instant case), will be construed to confer on the corporation immunity from all liability for damages, not imposed by statute law, for such location, construction, change of construction, and operation. Such immunity is inseparably attendant upon the sovereign right of eminent domain which the legislature exercises untrammelled and unabridged, save only as it may be restrained by the Constitution, and it will be construed to be conferred on such a corporation by necessary implication by general legislative enactment on the subject where the corporation acts in its public capacity. In such case the harsh rule of *damnum absque injuria* applies in bar of all suits against the corporation for damages not allowed by statute.
3. EMINENT DOMAIN—*Public Service Corporations—Private Capacity.*—When a public service corporation acts in its private capacity, mere general legislative authority to establish, locate and operate its works will not confer upon it immunity from liability for damages resulting from a construction and operation of such works which would have been deemed a private nuisance at common law.
4. EMINENT DOMAIN—*Public Service Corporations—Private Capacity.*—If such works were not constructed for the very public duties for which the public service corporation was incorpo-

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rated, but as incidental, adjunctive or appurtenant thereto merely, however necessary to the performance of the former duties, their operation will be considered and classed as an operation by the corporation in its private capacity. In such case the rule *sic utere tuo ut alienum non laedas* applies and controls the construction of the legislative enactment. The general legislative authority to locate, construct and operate the latter character of works will not be construed by implication to confer the immunity from liability for damages, and the harsh rule of *damnum absque injuria* has no application.

5. EMINENT DOMAIN—*Railroads—Nuisances—Switch Yards, Repair Shops or Terminal Plant.*—When railroad appurtenances, such as a round house, *switch yards*, repair shops or *terminal plant*, cause a nuisance to neighboring property by reason of noise, smoke, cinders, vibration, etc., there may be a recovery, where the switch yard operation complained of does not serve a passenger station or freight depot, so that such operation is not required of the railroad company in the discharge of its public duty in connection with such station or depot.

6. RAILROADS—*Nuisances—Terminal—Case at Bar.*—In the case at bar plaintiff instituted an action at law against defendant for damages alleged in the declaration to consist of the diminution of the market and rental value of certain land, dwelling house and other buildings thereon, located near defendant's terminal yard. It appeared that the tracks on such yard near to plaintiff's property were practically level when the dwelling house was erected and served as tracks for the reception, storing and retraining of cars, and that the damages were caused by a change of construction and operation by defendant of that portion of its tracks which were on the part of the terminal yard near to plaintiff's property. The change complained of was the construction of a large embankment, called a "hump," passing plaintiff's property and laying tracks thereon, and the propelling of trains of coal cars by engines other than those that brought the cars to the terminal yard up the grade by the plaintiff's property, causing loud noises, vibrations of the dwelling house and vast volumes of smoke, cinders, ashes and gases.

Held: That the new construction and operation of the part of the terminal yard complained of was but an operation merely incidental to the duties of the defendant which it performed in its public capacity.

7. RAILROADS—*Nuisances—Terminal—Switching Operation—Case at Bar.*—The change of method of operating the terminal yards in the instant case consisted, in ultimate fact, in withdrawing

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the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing (and) retraining" of cars; and the subsequent use of such tracks for the "transportation" of cars of coal; but such transportation was essentially a rehandling—a retraining—a switching yard transportation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation.

Error to a judgment of the Circuit Court of city of Norfolk, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

STATEMENT OF THE CASE AND FACTS.

This is an action at law by the plaintiff in error (hereinafter referred to as plaintiff) against the defendant in error (hereinafter referred to as defendant) for damages alleged in the declaration to consist of the diminution of the market and rental value of certain land, dwelling house and other buildings, etc., thereon, located near the defendant's terminal yard at Lambert's Point. It is alleged that the tracks on such yard near to plaintiff's property were practically level when the dwelling house was erected, and that such damages were caused by the following alleged change of construction and subsequent operation by defendant of that portion of its tracks which are on the part of the said terminal yard near to plaintiff's said property, namely: that (as alleged in substance in the first count of the declaration) the defendant within five years before the bringing of this suit constructed a large embankment, called a "hump," commencing at a point about one-sixth of a mile eastwardly from plaintiff's property and rising in a westerly direction at a very steep grade until it has passed said property; that

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upon said embankment as it rises there was laid a double track railroad; that such embankment is in close proximity to the plaintiff's dwelling house and the land on which it is located all owned by plaintiff; that such embankment is twenty feet high opposite plaintiff's property and continues to rise for a considerable distance westwardly beyond the same; that when defendant's trains of coal cars reach said terminal yard, they are broken up, and cars, in trains of about twenty, are propelled by engines employed for the purpose (being other engines than those which brought the trains into the terminal yard) up the grade of said "hump" and are so disposed of, in a yard provided for the purpose just beyond the summit of the "hump," that they may be thence propelled by gravity to a point in said terminal yard where appliances are provided for the purpose of transferring the coal into other cars, into which latter cars the coal is transferred and thence moved to vessels awaiting same at the piers, into which vessels the coal is then loaded; that daily since said embankment was erected the operation of the defendant of its tracks thereon, day and night, continuously, to the extent of forty trains a day, in the transportation of coal cars up said grade along by the plaintiff's property, has been such that because of such grade and the unusual amount of power required to propel said trains of coal cars up said grade (steam locomotives of very great power, using bituminous coal, being employed for that purpose), that, in such locality of the plaintiff's said property, "unusual, prolonged and very loud and annoying noises and vibrations of the dwelling house on said lot have been produced, which vibrations caused the plastering on the ceilings and side walls of it to crack and fall, and vast volumes of smoke, soot, cinders, ashes and gases were discharged from said locomotives and coal dust has been shaken and blown from said cars which fall upon said premises of the

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plaintiff, blackening and rendering dirty and unsightly the houses, fences, trees and shrubs thereon and entered the said dwelling house, settling upon the interior and the occupants (when occupied) and the contents thereof, and soiling the floors, walls, ceilings, doors, windows, furniture, furnishings, clothing, bedding, curtains, table coverings, food and other articles therein, the same being accompanied by foul, offensive and noisome odors which taint and corrupt the atmosphere; that damage and injury of the same nature, though less in degree, was and is done to plaintiff's said property by said trains of cars and locomotives returning over the tracks on said embankment; that the conditions whereof plaintiff * * * complains are of a permanent nature and will continue indefinitely: all of which have rendered the said dwelling house and premises, unclean and uncomfortable, unhealthy, undesirable and unfit for habitation and have damaged the plaintiff's said property and made it impossible to obtain and retain tenants and caused a considerable loss of rent and great depreciation in the market and rental value of the same."

The count of the declaration mentioned alleges a common law nuisance and is substantially the same as the declarations in the *Townsend* and *Terrell Cases* referred to in the opinion below.

The declaration is in two counts. The other count is substantially the same except that it omits the allegation of damages caused by the return of the trains of cars and locomotives over the tracks on the embankment and it alleges no loss of rental, but only depreciation of the market and rental value of the plaintiff's property and claims the *just compensation* therefor guaranteed by our State Constitution.

The defendant filed a special plea to the declaration, setting up the defense of legislative privilege—claiming (in substance) immunity from any liability to the plaintiff for

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damages on the ground that its acts complained of by the plaintiff were all done under legislative authority contained in its charter and in the charter of the Norfolk Terminal Company its predecessor in title, in strict conformity therewith and with due care and skill.

Omitting the formal parts, such special plea is as follows:

"(1) By act of the General Assembly of Virginia, approved March 17, 1851, the Norfolk and Petersburg Railroad Company was chartered, with authority to construct and operate a railroad, with steam as a motive power, from the city of Norfolk, Virginia, to the city of Petersburg, Virginia, and pursuant thereto, a line of railroad was constructed and has been continuously so operated by said company except that by successive charters, purchases, mergers and consolidations, all enacted or authorized by the General Assembly of Virginia, the said railroad has from the year 1896 down to the present date been owned and continuously operated, with steam as a motive power, by this defendant.

"(2) By act of the General Assembly of Virginia, approved March 6, 1882, the Norfolk Terminal Company was chartered and authorized to construct and operate a railroad, with steam as a motive power, from any point on the lines of the Norfolk and Western Railroad Company, in the county of Norfolk, Virginia, to any point or points on the Norfolk harbor or Chesapeake Bay, and to operate such railroad in conjunction with other railroads, and transport freight and passengers along its lines as a common carrier, and to construct, maintain and use piers for the delivery of freight to connecting water carriers.

"(3) By said act said Terminal Company was authorized to consolidate with the Norfolk and Western Railroad Company.

"(4) By articles of consolidation executed October 16, 1889, the Norfolk Terminal Company was consolidated with the Norfolk and Western Railroad Company.

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"(5) The entire property and corporate franchises, powers and privileges of the Norfolk and Western Railroad Company, including all the property and corporate franchises, powers and privileges of the *Norfolk Terminal Company,* were sold by order of the United States Circuit Court for the Eastern District of Virginia, and said sale confirmed by decree of said court entered September 19, 1896, and that by an act of the General Assembly of Virginia, approved January 15, 1896, it has been provided that whoever might become the purchaser of said property, franchises, powers and privileges in the cause then pending in said court should be constituted a corporation under such name as they should select, and vested with title to said property, franchises, powers and privileges, and that said purchasers thereafter adopted in due form the name of the Norfolk and Western Railway Company.

"(6) That on the day of , 1888, the ground upon which the tracks referred to in plaintiff's declaration, the operations over which are therein complained of, was owned by said Norfolk Terminal Company, and that said Norfolk Terminal Company in that year constructed tracks thereon which constituted a portion of its system of tracks for the reception, storing, retraining and transporting the cars en route in a direct line of transportation from its connection with the lines of the then Norfolk and Western Railroad Company, in Norfolk county, Virginia, to the piers then erected and owned by the Norfolk Terminal Company on the Norfolk harbor, and thereafter, in the year 1891, the said Norfolk Terminal Company having in 1889 become consolidated with the Norfolk and Western Railroad Company, the said Norfolk and Western Railroad Company from time to time constructed on said ground other tracks, which were used for like purposes, all of which said tracks so situate upon the ground referred to in the plaintiff's declaration were, continuously therefrom until a short time prior to

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December, 1913, used by this defendant and its predecessors in title in its service of transportation for the specific purpose as hereinafter more specifically set out.

"(7) That in furtherance of its service of transporting coal and other freight from the States of Ohio and West Virginia, consigned for delivery to vessels at Norfolk, Virginia, it became necessary frequently to retrain the cars loaded with coal and other freight at various points on said road with a view to efficient transportation over its lines connecting such retraining point.

"That such freight was and is delivered to such vessels at and from a structure called a coal pier, and said pier is connected with the lines of transportation of this defendant by tracks for the transportation of cars or containers and motor vehicles to propel the same.

"That the tracks, heretofore, to-wit, in 1888, constructed by this defendant and its predecessors in title, as aforesaid, over the lands in the plaintiff's declaration referred to as the location of what is therein termed as a "hump," and the immediate approaches thereto, were used from that time to the year 1913 as a route of transportation from one of said retraining points at Lambert's Point yards to points where said coal was transferred to the containers aforesaid, adapted to transporting said coal over said pier to said vessels.

"That a short time prior to December, 1913, it became necessary for this defendant, in the furtherance of its efforts to equip itself for the increasing demands of growing traffic, to alter the grade of its tracks over the said ground specified in the plaintiff's declaration by changing the grade from a level to an ascending grade with a rise of one and two tenths feet in each 100 feet, which is a lighter grade than that adopted and in use by this defendant in numerous places on other portions of its main lines, in order that the cars retrained at the Lambert's Point yard might be trans-

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ported in trains of thirty cars or less to a series of tracks on the defendant's system of railway from which all of said cars composing such trains might be drifted by gravity, one car at a time, to a place and apparatus near said coal pier where the contents of said cars could be transferred in bulk to containers adapted to running along said piers to the side of said vessels, and that the injury complained of in the plaintiff's declaration is the noise, smoke and cinders emitted from defendant's locomotives employed as the motive power for transporting said trains of cars upon the grade aforesaid; that said alteration was then begun and was completed in December, 1913, and from that time until the institution of this action, and to the present time, this defendant has continuously used its tracks so changed in respect to grade over said grounds for the purpose aforesaid, which the defendant avers are and were used in the performance of its services and duties as a common carrier, and further avers that all the uses and services to which the said tracks have been, or are now being subjected, were and are in the exercise of its privileges and in furtherance of its public duties as a common carrier, as a service constituting an essential part of its direct acts of transportation, as aforesaid.

"(8) And defendant avers that all its conduct and acts and operations aforesaid have been done and conducted with the exercise of due care and diligence and without negligence on its part."

There was a demurrer by the plaintiff to said plea, which was overruled by the court below by the order complained of and the case is therefore presented to us upon said declaration and plea with the demurrer to the latter.

From the allegations of the plea and those of the declaration not denied by the plea the following material facts appear:

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THE FACTS.

When in 1888 the ownership of the ground for right of way for the terminal yard above mentioned was acquired and when the yard was located by the Norfolk Terminal Company, the predecessor in title of the defendant, the charter of the latter did not require it to locate the yard at the place it was in fact located. It might have been located "at any point on the Norfolk harbor or Chesapeake Bay."

The "piers for the delivery of freight to connecting water carriers," mentioned in the charter, were not thereby required to be located at the place they were in fact located and they might have been located at any other place "on the Norfolk harbor or Chesapeake Bay."

The Terminal Company, after it was organized, and came into existence, never undertook to perform any duties of an independent common carrier. It never undertook to discharge any duties to the public with respect to the carriage of any freight originating on its line. No freight was received from or delivered by it to the public. It had no passenger or freight stations or depots. Its sole business was the construction and operation of a terminal yard as incidental, adjunctive or appurtenant to the business of the Norfolk and Western Railroad Company (afterwards the Norfolk and Western Railway Company, the defendant), and this incidental, adjunctive or appurtenant business was limited to the receiving of coal cars from the terminus of what was the main line of the defendant at Norfolk when this action was instituted, "storing, retraining and *transporting*" such coal cars, *i. e.*, storing, retraining and *distributing* them to their places of destination on the coal piers for transfer of their contents into the vessels of connecting water carriers, including, of course, the returning

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of the empty coal cars to Norfolk to the principal carrier.

When the defendant acquired the ownership of the ground of the right of way of said yard, it constructed other tracks thereon and operated the yard in the same way it had been operated, *i. e.*, as incidental, adjunctive or appurtenant to its business as a common carrier, *i. e.*, as a switching yard for the distribution of such coal cars aforesaid at their destination.

The defendant, prior to its change of construction of a part of said terminal yard and method of operating such part of it, in 1913, complained of in the declaration, used a system of tracks thereon which ran practically on a level "for the reception, storing retraining and transporting" (distributing) coal cars brought to it by its main line of railway.

There was in 1913 a change of method of construction and operation of a part of said terminal yard, consisting of the construction by defendant of a "hump" or embankment on the side of the yard nearest to plaintiff's property, the placing of two tracks, which had been located there on a level, on the ascending grade of such embankment so that they passed along near and opposite plaintiff's property at a height of about twenty feet above their former level, and the subsequent "transporting" of all the said coal cars to their destination on said piers, over such two tracks. That such subsequent operation by locomotives propelling such coal cars up such grade (although said construction and operation were all done with due care and skill) produced the noises, vibration, smoke, soot, dust, cinders and gases which then first began and caused the loss of rent and injury to the market and rental values of plaintiff's property, alleged in the declaration as above noted.

The two tracks last above referred to, after such change in method of construction and operation of the yard afore-

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said, were no longer used "for the reception, storing (and) retraining" of said coal cars, but solely for "transporting" them, but such "transporting" of them was merely from the receiving portion of the yard, below the grade aforesaid, to the summit of the embankment. On the summit of the embankment or "hump" there were constructed in 1913 a series of tracks which again received such coal cars, and by means of the latter tracks going thence down grade the coal cars were drifted by gravity, without the aid of any locomotives, and moved, one car at a time, to a place or apparatus near said coal piers where the contents of such coal cars were transferred in bulk to containers which ran along said piers to the sides of vessels and there deposited such coal into the vessels, its destination.

Mann & Tyler, for the plaintiff in error.

Hughes, Little & Seawell and *Waller R. Staples, Lucian H. Cocke* and *Theodore W. Reath*, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There are two questions raised by the assignments of error—(a) one question being whether the provision of the Constitution of Virginia of 1902 on the subject of private property being "damaged" for public uses without just compensation, does or does not, as to new construction and operation since such Constitution went into effect, annul the legislative privilege theretofore possessed by public service corporations, when acting in their public capacity, to damage private property without liability for damages, to the extent of making "just compensation?"; and (b) the other question being whether in the instant case the de-

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fendant was acting in its public or private capacity in doing the acts complained of, and hence whether it ever possessed the legislative privilege aforesaid pleaded by it in defense of the action?

In the view we take of the facts of this case and of the law applicable thereto, it will be necessary for us to consider only the latter question. Such question, it will be observed, is wholly independent of the constitutional question referred to and rests upon principles which existed prior to the Constitution of 1902, and which have continued to exist since, independently of the constitutional provision mentioned above. *Terrell* v. *C. & O. Ry. Co.*, 110 Va. 340, 348, 66 S. E. 55.

That a public service corporation may act in a private capacity, as distinguished from its public capacity, is now well settled. *Townsend* v. *Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970; *Terrell* v. *C. & O. Ry. Co.*, *supra*; *Southern Ry. Co.* v. *McMenamin*, 113 Va. 121, 73 S. E. 980.

It is true that if a public service corporation in locating, constructing or changing the construction, and in the operation of its works, acts in its public capacity, general legislative authority given it so to do, when strictly pursued, unless that authority is limited or annulled by constitutional provision in the particular in question, will be construed to confer on the corporation immunity from all liability for damages, not imposed by statute law, for such location, construction, change of construction and operation. Such immunity is inseparably attendent upon the sovereign right of eminent domain which the legislature exercises untrammelled and unabridged, save only as it may be restrained by the Constitution, and it will be construed to be conferred on such a corporation by necessary implication by general legislative enactment on the subject where the corporation acts in its public capacity. In such case the harsh rule of *damnum absque injuria* applies in bar of all

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suits against the corporation for damages not allowed by statute. *Fisher* v. *Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381. But, notwithstanding this rule—

It is settled law under the Virginia decisions cited above that, when a public service corporation acts in its private capacity, mere general legislative authority to establish, locate and operate its works will not confer upon it immunity from liability for damages resulting from a construction and operation of such works which would have been deemed a private nuisance at common law.

It is further settled by such decisions that if such works were not constructed for the very public duties for which the public service corporation was incorporated, but as incidental, adjunctive or appurtenant thereto merely, however necessary to the performance of the former duties, their operation will be considered and classed as an operation by the corporation in its private capacity. In such case the rule *sic utere tuo ut alienum non laedas* applies and controls the construction of the legislative enactment. The general legislative authority to locate, construct and operate the latter character of works will not be construed by implication to confer the immunity from liability for damages aforesaid, and the harsh rule of *damnum absque injuria* has no application.

This result, as pointed out by the opinion of this court delivered by Judge Keith, P., on rehearing in the *Townsend Case*, *supra*, may not be logical. As is there said: "Law is not an exact science. It has no invariable standard by which right may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of a syllogism." It will suffice here to say that such is the law, fixed by the decisions of this court above referred to and by the decisions of other courts of eminent authority therein cited.

Now then, was the change of construction and operation

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complained of in the instant case done by the defendant in its private capacity?

It is true that the operation complained of in the *Townsend Case, supra,* was of a power house; in the *Terrell Case, supra,* it was of a roundhouse; and in the *McMenamin Case* it was not the transportation of cars through the switch yard which was complained of, but the operation of a coal chute and power house, firing of engines on the yard, and other incidents to the operation of the yard, which were subjects of complaint; but these cases involved and were decided upon precisely the same principle which is involved in the classification of a switch yard of a railroad company, upon the inquiry of whether such construction and operation are done in the public or private capacity of such company.

In discussing this subject, 1 Lewis on Em. Dom. (3d ed.), at page 450, says: "On general principles, when railroad appurtenances, such as a roundhouse, *switch yards,* repair shops or *terminal plant,* cause a nuisance to neighboring property by reason of noise, smoke, cinders, vibration, etc., there may be a recovery. But there are authorities to the contrary."

Examination of the authorities cited by the learned author last quoted *pro* and *con* satisfies us that the text is supported by the greater weight of authority and is impregnably sustained by reason and upon principle, where the switch yard operation complained of does not serve a passenger station or freight depot, so that such operation is not required of the railroad company in the discharge of its public duty in connection with such station or depot.

Further: The recent case of *Matthias* v. *Minneapolis, etc., R. Co.,* 125 Minn. 224, 146 N. W. 153, 51 L. R. A. (N. S.) 1017, decided since Mr. Lewis' estimable work referred to was published. is directly in point on the question we have under consideration as presented in the instant case.

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That case involved a terminal yard, and, as in the instant case, the cars of freight were originally carried over tracks constructed and operated practically on a level. In that case, it is true, the ground acquired by the railroad company for its switch yard was in addition to the ground on which its original main line tracks were located and over which it for many years transported its cars of freight; but that circumstance, as we shall see, is immaterial. In 1912 the railroad company acquired additional land alongside of its original main line track, on the opposite side of such original right of way from the property of the plaintiff, and constructed a receiving yard on a part of such newly acquired land and a "hump" or embankment on another part of it, with an up-grade similar to that in the instant case, and thereafter diverted its cars of freight containing wheat, coming in over its main line, and "transported" such cars over the "hump," propelling them by locomotives to the summit of the "hump" to a series of tracks located on such summit, which there received such cars, and by means of the latter tracks, going thence downgrade the cars of wheat were drifted by gravity, without the aid of any locomotives, and moved to the grain elevators, where the contents of such cars of wheat were transferred into the elevators, its destination.

The "transportation" of the cars of wheat in the *Matthias Case* over the grade of the "hump" were precisely as much main line transportation and no more than was the "transportation" of the cars of coal in the instant case, over the "hump." It was essentially the same operation in both cases and that was a switching operation. In a certain sense, it is true, it was but a link in the transportation of the cars from their point of original shipment, perhaps in a distant State, over the main line of the railroad company until they reached its terminal yard, being detrained at such terminal yard to be retrained and carried over the "hump," as per-

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haps they had been detrained, switched and retrained at various other switch yards at certain ends of divisions of the company's main line before they reached the terminal yard in question, where switch yards for that purpose were provided by the company. But it is the construction of such very appurtenances and their operation which are not main line construction or operation, of the very public service for which the railroad company was incorporated, unless they serve stations or depots as aforesaid. They are, in such a case as the *Matthias Case* and the instant case, essentially merely appurtenant—mere incidental construction and operation—however necessary to the transportation service of the company, and their construction and operation necessarily fall within the same classification and rule applicable thereto as roundhouses, coal chutes, etc., and their operation.

Accordingly, in the *Matthias Case,* the railroad company was held liable in damages for a similar nuisance at common law, with similar results as alleged in the declaration in the instant case. In the *Matthias Case,* as in the instant case, the entrance or approach to the plaintiff's property was not interferred with by the railroad company. No part of the plaintiff's property was *taken* in either case. In the *Matthias Case* the new construction and operation complained of was about 600 feet from the plaintiff's dwelling house, on the opposite side of the railroad's original main line tracks right of way, whereas in the instant case the operation complained of was on the same side of defendant's right of way as the plaintiff's property.

The change of method of operating said terminal yard in the instant case consisted, in ultimate fact, in withdrawing the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing (and) retraining" of cars; and the subsequent use of such tracks for the "trans-

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portation" of cars of coal; but such transportation was essentially a rehandling—a retraining—a switching yard transportation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation—a switching of coal cars from one receiving yard below to another receiving yard above, upon the summit of the "hump" or embankment, where "a series of tracks on defendant's" terminal yard again received such cars, from whence they were drifted, one car at a time, on their way to containers which received their contents in bulk and, in turn, distributed the coal at different places along the piers by depositing it in vessels there awaiting it.

Moreover, in the instant case, the conclusion that the new construction and operation of a part of the terminal yard complained of in the declaration was but an operation merely incidental to the duties of the defendant which it performed in its public capacity is apparent when we consider the original relationship of the defendant, and its predecessor in title the Norfolk and Western Railroad Company, to the Norfolk Terminal Company and its operation of this terminal yard. Prior to the acquisition by the Norfolk and Western Railroad Company and defendant of such yard, their main line terminated at Norfolk. They had not undertaken, nor did their charters impose upon them any duties whatever to operate such yard. The Norfolk Terminal Company constructed and operated this yard under its charter, not as a common carrier, with the public duty imposed by law on all common carriers of freight on whom the right of eminent domain is conferred by statute, of receiving and transporting all freight tendered to it by the public for transportation. It never assumed or undertook to discharge that public duty, although perhaps its charter was broad enough to have authorized it to do so. It never equipped itself with any depot or other facilities

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for that purpose. The only duty it ever performed or undertook to perform was the mere duty of operating a terminal yard, or switch yard for the defendant's predecessor, the Norfolk and Western Railroad Company, so as to distribute a portion of a particular kind of freight brought to Norfolk by the last named company, to-wit, the cars of coal destined to vessels of connecting water carriers. In performing such a duty it was not performing a duty to the public such as the Norfolk and Western Railroad Company was then performing as a common carrier in bringing such freight to Norfolk. It was performing only a contract duty to the latter company, and a duty of precisely the same character as might have been performed by a transfer company, incorporated or unincorporated, carrying passengers or freight from the terminus of the Norfolk and Western Railroad Company's line to wharfs or vessels or to the stations or depots of other carriers located in or near Norfolk (*Kentuck, &c., Bridge Co.* v. *L. & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289), or as might have been performed by any other incorporated company supplying the Norfolk and Western Railroad Company, under contract, with light, heat or power, or any other like service incident and even necessary for the performance of its duty as a common carrier. And it was a duty neither the Norfolk and Western Railroad Company nor defendant could have been compelled to allow the Norfolk Terminal Company to perform. (See the case last above cited.)

Therefore, when the Norfolk Terminal Company constructed and while it operated said terminal yard, it is plain it was performing no duty which the Norfolk and Western Railroad Company was required by its charter or by other statute to perform. Moreover, it was performing no public duty, imperatively imposed by law on it upon its undertaking such business, but merely (as above stated) a contract duty to the Norfolk and Western Railroad Company, which

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it was *permissively* authorized to perform by its charter. Clearly, then, the original construction and subsequent operation of said terminal yard by the Norfolk Terminal Company fell within the classification of the power house operation in the *Townsend Case, supra.*

This becomes more apparent when the permissive character of the charter of the Norfolk Terminal Company, with respect to the location of the terminal yard, is compared with that of the legislative act relied on by the defendant in the *Townsend Case.* The statute in that case provided: "The said company shall have power to construct, lease, purchase or acquire by consolidation with any other company or companies and operate and maintain in the city or county of Norfolk, or both, and in any other city, town or village in the said county, suitable works, machinery and plants for the manufacture of electricity * * *." In the opinion of this court, delivered by Judge Keith, P., on rehearing, in reference to such legislative authority, it is said: "It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, 'or by clear and unquestionable implication from the powers given,' so that it cannot be fairly said that 'the legislature contemplated the doing of the very act which occasioned the injury, and immunity is not to be presumed from a general grant of authority.'" As noted in the statement of facts about the charter of the Norfolk Terminal Company, it did not designate the location of the terminal yard. By the express terms of such charter, it might have been located "at any point on the Norfolk harbor or Chesapeake Bay." Hence, upon the reasoning in and upon the principle on which the *Townsend Case* rests, the construction and operation of said terminal yard by the Norfolk Terminal Company must be classed as action by that company in its private capacity, merely incidental to the public service of

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the Norfolk and Western Railroad Company, whom it served, and not protected by the shield of legislative privilege aforesaid.

This being so, it is apparent that upon the subsequent acquisition of the terminal yard, its operation by the Norfolk and Western Railroad Company, and later by the defendant, the Norfolk and Western Railway Company, was the same character of service to themselves, namely, in their private capacity. The defendant, therefore, would have been liable in damages for the nuisance at common law alleged in the declaration in the instant case under the *Townsend Case* and other authorities above cited, had the nuisance been caused by the original operation of the terminal yard by it, and is so liable for the new construction and operation of the terminal yard complained of in the plaintiff's declaration. Such new construction and operation is material in the instant case only as bearing on the beginning of the injury alleged and the consequent commencement of the running of the statute of limitations.

The case of *Fisher* v. *Seaboard Air Line Ry. Co., supra,* however, is strongly urged by the defendant upon our attention as being opposed to the conclusion we have reached, above stated. As pointed out in the *Townsend* and *Terrell Cases, supra,* the *Fisher Case* involved a main line change of construction and operation of the railroad company, and hence action of the latter in its public capacity. As we have noted above, for such action, if in strict pursuance of the legislative authority and performed with due care and skill, the legislative privilege, subject only to such liability as the statute law provides, is an absolute bar to the assertion against the railroad company of any liability for damages, if such legislative privilege exists. It does exist as to main line construction and operations of a railroad company, if the legislative authority invoked has been strictly pursued, and such authority has not been limited or an-

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nulled in any particular by the Constitution of the State. As to any construction or operation by a railroad company, however, which is not in its public, but in its private capacity, general legislative privilege is no bar to the assertion against it of liability for damages for any action which creates a nuisance at common law, although the legislative authority be unlimited and be not annulled in any particular by the Constitution of the State. Hence the *Fisher Case* in no way conflicts with out conclusion aforesaid.

The same reason which distinguishes the *Fisher Case* from the instant case also distinguishes therefrom the following cases relied on for defendant, namely: *Bennett* v. *Long Island Ry. Co.*, 181 N. Y. 431, 74 N. E. 418; *Chicago* v. *Union Stock Yards*, 164 Ill. 224, 35 L. R. A. 281; *C. R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 25; *I. C. R. Co.* v. *Grabill*, 50 Ill. 224; *Carroll* v. *Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661.

Defendant also relies on the case of *Church* v. *Oregon Short Line, supra.* That was a switch yard case. It was an action to recover damages for injuries to plaintiff's church property, alleged to have been caused by the annoyance of *noise only* of trains and engines on tracks lawfully constructed and operated for purposes of switching and making up of trains near the church. The court in that case, it is true, held that switch yards do not fall within the same class as roundhouses, coal chutes, etc., and that railroads as to the operation of their switch yards enjoy the same immunity from liability for damages as they do with respect to main line operations, because of legislative privileges. But as we have seen such a holding, in that broadness of application, is unsound in principle and opposed to other authority. And in that case it is conceded that if instead of the mere annoyance from noise only, there had been a physical disturbance or interference with the property right by the casting of soot, cinders, etc., upon the

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property, a vibration of it, or the emission of smoke, physically injuring the property and causing a nuisance of that character, the plaintiff would have been entitled to recover damages. On this point the court in its opinion, at p. 864, said: "To obtain relief for the latter consequences in a case of nuisance no constitutional nor statutory enactment was necessary." We merely note the latter view in passing, but we do not wish to be understood as agreeing with the conclusion of law there stated. In our opinion, both upon principle and upon the overwhelming weight of authority, which it would be out of place here to cite, if a switch yard construction and operation falls within the same class as main line construction and operation, and consequently within the immunity from liability for damages aforesaid by legislative privilege, then, unless the legislative authority is limited or annulled in some particular by the State Constitution, no action for damages in such case would lie.

The case of *L. & N. Terminal Co.* v. *Lellyett*, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49, is also relied on for defendant. But in that case the operation of a switch yard, as well as of a roundhouse, coal chute, an up-grade track construction to coal bins, and operation of engines and cars thereon, were complained of, and the injury resulting from the operation of the switch yard was perhaps the gravamen of the case according to the proof. And the court in its opinion draws no distinction between the switch yard operation and the other operations complained of, but classes the former, as well as the latter, as being done by the railroad company in its private capacity—which is in accord with the true principle involved and with our holding above.

Numerous other decisions are cited for plaintiff and defendant, but they bear chiefly upon the constitutional question first above mentioned, which it is unnecessary for us

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to consider in the instant case and hence any detailed reference to such cases would needlessly prolong this opinion.

For the foregoing reasons we are of opinion that there was error in the order complained of, and the same will be set aside and annulled, the demurrer of the plaintiff to the plea of the defendant aforesaid will be sustained, and the case will be remanded to the trial court for further proceedings to be had therein not in conflict with this opinion.

Reversed.

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Syllabus.

Richmond.

J. C. LYSLE MILLING COMPANY v. S. W. HOLT AND COMPANY.

March 21, 1918.

1. ORDER OF PROOF—*Discretion of Court.*—The order in which proof is introduced is a matter in the discretion of the trial court.
2. AGENCY—*Authority—Declaration of Agents.*—While the declarations of an alleged agent are inadmissible to prove agency, if the agency be otherwise *prima facie* proved, they become admissible in corroboration.
3. AGENCY—*Authority.*—While, as between principal and agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third parties ignorant thereof; and as between the principal and agent and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority.
4. AGENCY — *Authority — Commercial Travelers or Drummers.*— There is inherent difficulty in proving the scope of a traveling salesman's authority where it depends upon parol testimony, especially where the principal is a corporation and a non-resident. In the case at bar the question at issue was whether an agent of defendant had authority to make a sale, or whether his authority was limited to taking an order subject to acceptance and confirmation by defendant. There was direct testimony tending materially to show that the authority of defendant's agent carried with it the authority to make sales, and that he was not merely a drummer, or commercial traveler, in the narrow sense of that term, with authority only to take orders subject to acceptance and confirmation by his principal, and therefore, the court properly allowed the ques-

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tion of the agent's authority to make the sale in question to go to the jury.

5. INSTRUCTIONS—*Instructions not Certified—Appeal and Error.*—Before the Supreme Court of Appeals can hold that the giving of an isolated instruction constituted reversible error, in a case where all the instructions are not certified, it will have to clearly appear that the instruction in itself was vitally wrong, and that other instructions could not have cured the error.

6. INSTRUCTIONS—*Instructions not Certified—Appeal and Error.*—In the case at bar, the particular instruction complained of was susceptible of application to more than one feature of the evidence. The instruction itself, taken with another which was admittedly given, shows that the jury could not have been misled by it upon the decisive and only really controverted question of the agent's authority to make sales of flour without confirmation, and the instructions as a whole might have still further remedied the error complained of, if error it was.

Error to a judgment of the Circuit Court of Elizabeth City county. Judgment for plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

Peatross & Savage, for the plaintiff in error.

J. Winston Read, for the defendants in error.

KELLY, J., delivered the opinion of the court.

This is an action of assumpsit brought by S. W. Holt & Company, a partnership, in Newport News, Va., against the J. C. Lysle Milling Company, a corporation created by and doing business in the State of Kansas, to recover damages for a failure on the part of the defendant to deliver certain flour alleged to have been purchased from it by the plaintiffs. There was a verdict and judgment in the court below for the plaintiffs, and the defendant brings the case here upon a writ of error. We will designate the parties

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here as plaintiffs and defendants, respectively, in accordance with their positions in the lower court.

The controlling question in the case is whether the evidence of the authority of J. G. Fitzhugh, the alleged agent of the defendant who made the contract of sale, was sufficient to support the verdict of the jury. If there was such evidence, then the assignment of error based on the fact that the court allowed proof of certain declarations of the agent to go to the jury before the agency was established must fail, because the order in which proof is introduced is a matter in the discretion of the trial court. 1 Mechem on Agency (2d ed.), section 288; *Id.*, section 285, p. 208, note 81; *McIntyre* v. *Smith*, 108 Va. 736, 62 S. E. 930.

The evidence upon which the case depends will, in substance, appear from the following statement:

On the 11th day of July, 1916, J. G. Fitzhugh, who admittedly was, and had been for some years, representing the defendant as a salesman, and who seems to have had independent headquarters somewhere in the South rather than at the home office of the defendant in Kansas, called on the plaintiffs and made a written contract with them for the sale of three carloads of flour, the contract being in the words and figures following:

"Book
"S. W. Holt & Co.

"3 cars flour, White Eagle, cotton and wood five and fifteen hundredths. One car shipment last half July, the other two cars sixty days after guaranteed against decline bu. ninety-five cents. No. 2 Red Wheat K. C. The first is to be shipped forty-five days time, and if not satisfactory we are to take up the unused part and cancel the contract. All our flour is to be shipped thirty days open account.

"THE J. C. LYSLE MILLING CO.,
"Per J. G. F."

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On the following day, according to testimony introduced by the defendant, Fitzhugh wired the substance of this contract from Richmond to the home office of the defendant, adding the words, "all subject to confirmation," and the defendant replied to Fitzhugh at Richmond by wire that day: "Market for red wheat dollar twelve to-day. Cannot accept order submitted less than six sixty basis crest;" and also wrote the southern office of The J. C. Lysle Milling Company, at Jackson, Miss., to the same effect. The defendant did not communicate at all with the plaintiff and it contends that there was no reason for doing so because the contract was subject to confirmation; but Fitzhugh did not testify and no explanation is offered for the established fact that he did not notify the plaintiffs that the contract had been rejected; nor is any reason assigned to explain why he should have wired the defendant that the sale was subject to confirmation, if, as contended by the defendant, he had no authority in any case to make a sale otherwise.

The plaintiffs believed the contract was complete and expected fulfilment of the same; and when the first consignment called for therein failed to arrive, they wrote defendant calling attention to the contract and urging prompt shipment. The defendant replied, stating, in substance, that it had never confirmed the contract and did not recognize it as valid and binding. In the meantime, there was a very substantial advance in the market price of flour; and this suit was brought to recover the difference between the contract price and the price on the market at the date fixed for delivery in the alleged contract.

During the negotiations between Fitzhugh and the plaintiffs, he stated that he was the southern sales agent of the defendant; that the contract required no confirmation; that the price he made was somewhat under the selling price of his flour, but he would make the sale at that price

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in order to meet the price of a certain competitor and because he was anxious to get this particular flour on the market in Newport News. He had been trying to sell the defendant's flour to the plaintiffs for several years, and the defendant had previously sent samples thereof to the plaintiffs, but Fitzhugh had not theretofore succeeded in interesting them.

There was evidence tending to show that Fitzhugh had been using letter heads in his correspondence which the plaintiffs had seen and which showed that he was the southern representative of the defendant company. In this connection, one of the plaintiffs testified, on cross-examination, as follows:

"Q. Mr. Fitzhugh's business has been that of salesman for the J. C. Lysle Milling Company, has it not? A. He is their southern representative—I suppose he has salesmen under him. I don't know whether you call him a salesman or their head southern representative—that's the way I consider him—his letter shows him as their southern representative.

"Q. All you know is the information you have gotten from his letter heads and his conversations with you? A. Yes, no other information. I imagine his letter heads sometimes go to the Lysle Milling Company, and if not true they would not allow him to sail under false colors.

"Q. They set out he is then the southern sales manager of the J. C. Lysle Milling Company, and has other salesmen under him? A. Yes, he has charge of that part of it in addition to being a partner in the concern."

It further appeared that, about a year prior to the contract in question, Fitzhugh had made a sale of flour to J. W. Rowe & Company of Hampton, Va., without confirmation and substantially in the form of the contract here involved. The defendant not only recognized the sale, but paid for a somewhat extensive demonstration and advertisement of

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the flour thus sold, all of which was arranged for and directed by Fitzhugh. .In June, 1916, Fitzhugh made a second sale to Rowe & Co., and after a controversy had arisen in regard to it, the defendant wrote that firm a letter in which it was stated, among other things, "Whatever Mr. Fitzhugh agreed to do he will unquestionably do. At the time Mr. Fitzhugh booked you for the flour he sold it at twenty cents under our limits * * * As Mr. Fitzhugh talked this matter over with you thoroughly, we are going to send him your letter, and if there is anything due you, you will certainly get the benefit of the same."

The defendant contended and produced proof to show that Fitzhugh was merely a "drummer," or "commercial traveler," in the narrow sense of that term, with authority only to take orders subject to acceptance and confirmation. If this claim as to his agency could be regarded as a fact conclusively established, then the law of the case would be with the defendant. 6 Am. & Eng. Ency. L. (2d ed.) 224; *John Matthews Apparatus Co.* v. *Renz* (Ky.), 61 S. W. 9; *L. A. Becker Co.* v. *Alvey* (Ky.), 86 S. W. 974.

The primary inquiry, however, is whether Fitzhugh was in fact acting merely in the capacity of a drummer. Looking to the evidence as a whole, we think there was direct testimony tending materially to show that his agency carried with it the authority to make sales, and that, therefore, the court properly allowed the question of authority to go to the jury. This being true, it was proper also to admit, in corroboration, the declarations on that subject made by Fitzhugh in the course of the exercise of his alleged agency.

"While the declarations of an alleged agent are inadmissible to prove agency, if the agency be otherwise *prima facie* proved, they become admissible in corroboration." 31 Cyc. 1655, and cases cited in note 11. 1 Mechem on Agency (2d ed.), section 285, and note on page 209.

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There is inherent difficulty in proving the scope of a traveling salesman's authority where it depends upon parol testimony, especially where the principal is a corporation and a non-resident; and the authorities are not exacting in the degree or amount of proof required of the party alleging the agency. Upon the whole case, we are of opinion that the jury was warranted in finding that Fitzhugh was acting in the scope of his apparent authority.

"It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish agency in any given case. That is a question which must be determined in view of the facts in each particular case. Whatever form of proof is relied upon, however, must have a tendency to prove agency, and must be sufficient in probative force to establish it by a preponderance of the evidence. It may be said in general terms, however, that whatever evidence has a tendency to prove the agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it. So if evidence has first been introduced tending to prove the agency, or to make out a *prima facie* case thereof, the admissions and declarations of the alleged agent, if otherwise competent, may then be shown, and the whole case be passed upon by the jury." 1 Mechem on Agency (2d ed.), section 299. See also *Id.* section 261 and note 7; *Id.*, section 296; *Henderson* v. *Mayhew*, 2 Gill. (Md.), 393, 41 Am. Dec. 434, 435; *Morrison* v. *Whiteside*, 17 Md. 452, 79 Am. Dec. 661, 664.

"While, as between principal and agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third parties ignorant thereof; and as between the principal and agent and third persons, the mutual rights and liabilities are governed by the appar-

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ent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority." 31 Cyc. 1333, and cases cited.

Several assignments of error relate to the action of the court in giving certain instructions on behalf of the plaintiffs, and in refusing certain others asked for by the defendant. The instructions as a whole are not certified. Counsel for defendant concede that this fact is fatal to the assignments based upon the refusal of instructions requested on behalf of the defendant, since the presumption is that the judgment of the lower court was right and that the instructions as a whole were correct. It is insisted, however, that this rule does not go far enough to cure an error where, as claimed in this case, it appears that an erroneous instruction has been given, because even if the court below did give a correct instruction upon the same subject, the two taken together would be contradictory, would tend materially to confuse the jury, and thus constitute reversible error. Whatever may be the merits of this contention as a general proposition, we deem it sufficient to say that in our opinion it cannot be availed of in the present case. The particular instruction complained of was susceptible of application to more than one feature of the evidence. The instruction itself, taken with another which was admittedly given, shows that the jury could not have been misled by it upon the decisive and only really controverted question of the agent's authority to make sales of flour without confirmation. The instructions as a whole, for aught we can

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say, might have still further remedied the error complained of, if error it was. Before we could properly hold that the giving of an isolated instruction constituted reversible error, in a case where all the instructions are not certified, it would have to clearly appear that the instruction in itself was vitally wrong, and that other instructions could not have cured the error.

The judgment of the circuit court is affirmed.

Affirmed.

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Richmond.

MAIN STREET BANK, INC., v. CITY OF RICHMOND AND OTHERS.

March 21, 1918.

1. TAXATION—*Bank Stock—Erroneous Assessment—Proceeding to Correct by Bank.*—Code of 1904, sections 567 and 571, provide that any person assessed with State and local taxes, who is aggrieved by any such assessment may proceed by motion for the correction of any assessment which is erroneous. As under sections 17 to 22 of the revenue law, Code of 1904, appendix, providing for the taxation of bank stock, it clearly appears that the tax is a tax against the individual stockholder and not against the bank, and that the bank, as such, is in no event responsible for the tax unless it has funds of the stockholder in its possession out of which the tax can be paid, the bank cannot proceed under sections 567 and 571, Code of 1904, for relief against an alleged erroneous assessment of State and local taxes upon the stock of the bank, but the remedy of each stockholder, however, is clear under sections 567 to 571, inclusive. This remedy is complete and effective.

Error to a judgment of the Hustings Court of city of Richmond, on a motion to correct an erroneous assessment. Judgment for defendants. Plaintiff assigns error.

Affirmed.

The opinion states the case.

O'Flaherty, Fulton & Byrd, for the plaintiff in error.

Attorney-General J. D. Hank, Jr., Assistant Attorney-General Leon M. Bazile, and *H. R. Pollard,* for the defendants in error.

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PRENTIS, J., delivered the opinion of the court.

The Main Street Bank, Inc., proceeded under sections 567 and 571 for relief against an alleged erroneous assessment of State and local taxes for the year 1914. The trial court dismissed the motion, and the bank is here complaining.

One controlling question is whether or not the bank can proceed under those sections, and to determine this it is only necessary to refer to the statutes under which the taxes were levied.

Sections 17 to 22, inclusive, of the revenue law, provide for the taxation of bank stock. Under section 17 it is expressly provided that no tax shall be assessed upon the capital of a bank, and that the bank shall annually return to the local commissioner of the revenue a report in which shall be given the names and residences of all of its stockholders, together with the number and actual value of the shares of stock held by each stockholder, for certain deductions of personal debts of individual stockholders from the value of the shares owned by such stockholders and for the adjustment of the credits due to each stockholder by reason of deductions so authorized. Section 18 provides that it shall be the duty of the commissioner of the revenue, when he receives such report to assess each stockholder upon the value of the shares of stock owned by him thus ascertained, and that three assessment lists shall be made out, one of which shall be delivered to the bank, one to the Auditor of Public Accounts, and the other retained by the commissioner; that the assessment list thus delivered to the bank shall be a notice to the bank of the tax assessed against each of its stockholders, and have the legal force and effect of a summons upon suggestion formally issued and regularly served; that the tax assessed upon each stockholder shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, and

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have priority over any and all other liens; that the bank shall hold the dividends or other funds belonging to the stockholder, in its custody at the time of the assessment, or which shall thereafter come under its control, for the use of the Commonwealth, and apply such funds to the payment of the tax thus assessed against each stockholder, and that when thus applied the bank shall be acquitted of all liability to the stockholder for the money thus disbursed on his account. Section 19 provides, that the bank shall pay the taxes into the treasury on or before the first day of June of each year. Section 20 provides, that in case the bank fails to pay the tax assessed against its stockholders on or before the date named, then the Auditor of Public Accounts shall transmit to the treasurer of the county or city in which the bank is located a copy of the assessment, and that the treasurer shall collect the taxes thereby assessed and shall levy upon the stock of the taxpayer or so much thereof as is necessary to pay the tax, sell the same at public auction, and give the purchaser a bill of sale therefor. Section 21 provides, that the share or shares of stock so sold shall be transferred to the purchaser, in case of such sale for taxes, and that in case the taxes are not thus collected, they may be collected from the stockholder in default by levy or distress against his property as other State taxes are collected; and section 22 provides for a fine against the bank if it fails to comply with the provisions of the preceding sections. In every section of the law it is thus clearly shown that the tax is a tax against the individual stockholder and not against the bank, and that the bank, as such, is in no event responsible for the tax unless it has funds of the stockholder in its possession out of which such tax can be paid.

Section 567, referring to State taxes, and section 571, referring to levies and local taxes, provide that any person assessed therewith who is aggrieved by any such assessment may proceed by motion for the correction of any as-

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sessment which is erroneous. In this case, no assessment whatever has been or can be made against the Main Street Bank, Inc., and none of its funds is liable for the taxes so specifically assessed against its several stockholders. As to funds in its possession belonging to the stockholders, the bank has the status of a garnishee by the express terms of the statute, and in making the payments to the tax collecting officers it simply acts as the agent of each of its stockholders. That agency, however, is limited by the statute itself. The bank is an agent for the payment of the debts of its stockholders only to the extent to which it has funds in its possession with which to pay such debts, and its liability therefor is thus limited. There is no line or suggestion in any of these statutes which justifies a suit or proceeding by the bank for the correction of an error as to taxes so assessed against its stockholders or any of them. The remedy of each stockholder, however, is clear under sections 567 to 571, inclusive. This remedy is complete and effective. Similar statutes exist in other States, and have received a similar construction. *State Farmers' National Bank* v. *Cook*, 32 N. J. Law, 347; *People* v. *Wall Street Bank*, 39 Hun. (N. Y.) 525; People ex rel. *Kohler* v. *Feitner*, 71 App. Div. 572, 76 N. Y. Supp. 245; *People* v. *Button*, 17 N. Y. Supp. 315.

The error alleged in this case grows out of the report made by the officers of the bank, wherein the gross value of the property of the stockholders thus liable for taxation is stated to be $153,524.89, or over $39 per share, whereas because the bank was carrying its real estate upon its books at an excessive valuation, as well as a large amount of worthless bills receivable which should have been omitted, the gross assets liable for taxation should only have been reported at $93,572.71, or something above $24 per share.

It is unnecessary for us to consider in this case whether or not this error on the part of the officials of the bank can

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be corrected upon the motion of any stockholder who may be entitled to relief; it is clear that it cannot be corrected upon the motion of the bank under sections 567 and 571, for its property has not been assessed and its funds are in no way involved. *Union Bank* v. *Richmond*, 94 Va. 316, 26 S. E. 821; *Van Allen* v. *Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People, etc.*, v. *Commissioners*, 4 Wall. 244, 18 L. Ed. 345; *First National Bank* v. *Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Mercantile Bank* v. *New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Citizens' National Bank* v. *Kentucky*, 217 U. S. 453, 30 Sup. Ct. 535, 54 L. Ed. 836.

Affirmed.

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Richmond.

MOPSIKOV v. COOK.

March 21, 1918.

1. LIBEL AND SLANDER—*Hearsay Evidence.*—In an action for slander plaintiff testified "that his little girl said to him: 'Father, what is this they say about me, they say I am a nigger.' That he said to his little girl: 'No, darling, you are not, and they will be made to prove it.'" It nowhere appeared in the evidence that the defendant made the statement to the little girl that she was a negro, or that he caused it to be made. The fact that such a statement was made to the daughter was therefore inadmissible. Moreover, the father did not claim to know that the statement was in fact made to his daughter by anyone. The testimony of the father as to such statement was purely hearsay and hence also inadmissible. That error in the admission of such testimony was prejudicial to the defendant is obvious.

2. LIBEL AND SLANDER—*Evidence.*—In an action for slander, plaintiff's little daughter was allowed to testify that defendant's little girl called her a nigger doll.

Held: That the admission of this testimony was reversible error, because it presented to the jury a statement to the plaintiff's daughter which was not made by the defendant, nor caused to be made by him, so far as appears from the record.

3. PARENT AND CHILD—*Torts—Libel and Slander.*—The mere relationship of father and child in the case at bar did not make the father legally responsible for the slanderous words of his minor daughter.

4. LIBEL AND SLANDER—*Origin of the Slander—Mitigation of Damages.*—The weight of authority is in favor of the view that if the defendant did not originate the slander, that is a circumstance which should be taken into consideration by the jury along with all the other evidence in the case, on the question of the presence or absence of actual malice, as distinguished from malice in law, in the speaking of defamatory words. At the same time, a defamatory statement not originated by him who repeats it, but one known by the latter to be false when he repeats it, may be as malicious as if originated by the slanderer. Hence, the isolated fact, if it be a fact, that the

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defendant did not originate the slander, may or may not mitigate the damages in a particular case.

5. LIBEL AND SLANDER—*Instructions—Origin of Slander.*—A request that the court instruct the jury in an action for slander that if they believe from the evidence that the defendant did not originate the alleged slander that that should be considered in mitigation of damages, was properly refused, in the absence of evidence on the part of the defendant as to his *bona fide* belief in the truth of his statement; and even though such evidence was present the trial court should avoid singling out the circumstance of the non-originating of the slander by the defendant; it should refer to that as merely one of the facts or circumstances to be considered by the jury along with all the other facts or circumstances in the case as bearing on the presence or absence of actual malice in the utterance of the slander, and should avoid the statement that such evidence might be considered by the jury in mitigation of damages.

6. INSTRUCTIONS—*Weight of Evidence—Libel and Slander.*—An instruction that if the jury believe from the evidence that the defendant did not originate the alleged slander that that should be considered in mitigation of damages, is on the subject of the weight of evidence, on which a trial judge must, under our practice, be particularly watchful and guarded in the matter of giving instructions to the jury, so as not to invade the rightful province of that important component part of the court.

7. LIBEL AND SLANDER—*Instructions.*—An instruction which plainly referred the questions of fact to the jury, both whether the defendant used the words in the declaration mentioned, and whether he used them in bad faith and with malice, did not assume that the defendant used such words.

8. LIBEL AND SLANDER—*Instructions.*—Where there was no defense offered that the words complained of were not used in accordance with their usual construction and common acceptation, but the plaintiff expressly admitted so using them, an instruction is not erroneous because it contained the peremptory command that, if the jury believed that the alleged words were used and that such words from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, the jury *must* find for the plaintiff.

9. LIBEL AND SLANDER—*Damages—Pleading.*—The words alleged in the declaration were proved to have been spoken as alleged. They were actionable *per se* under the statute in Virginia on the subject. In such case no averment or proof of special damage is necessary. The declaration alleged that the words affected the plaintiff's business. If so, they were actionable *per se* at common law also and a general allegation and general

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proof of damages to the plaintiff's business was sufficient to sustain a finding by the jury of such damages without averment or proof of special damage to such business.

Error to a judgment of the Hustings Court of city of Portsmouth, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

STATEMENT OF THE CASE AND FACTS.

This is an action by the defendant in error (who will be hereinafter referred to as plaintiff) against the plaintiff in error (who will be hereinafter referred to as defendant) for damages for slander. The defamatory words were alleged to have been spoken on a certain day named in the declaration and were to the effect that the plaintiff was a negro.

There was a plea of the general issue of not guilty by the defendant; a trial by jury upon the evidence and instructions which appear in the record; a verdict of $2,000 in favor of the plaintiff, which the trial judge refused to set aside; and the judgment of the trial court thereon, which is complained of before us by the defendant.

The assignments of error and the facts so far as necessary to be considered will be stated in the opinion of the court below.

Tazewell Taylor and *J. L. Broudy,* for the plaintiff in error.

Richard J. Davis, Wolcott, Wolcott, Lankford & Kear and *Jno. W. Reynolds,* for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

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1. Upon the trial of the case the plaintiff was permitted over the objection of the defendant, to testify to the following conversation between himself and his daughter of about nine years of age. The plaintiff testified "that his little girl said to him: 'Father, what is this they say about me, they say I am a nigger.' That he said to his little girl: 'No, darling, you are not, and they will be made to prove it.'"

The admission of this testimony is the basis of one of the assignments of error.

Omitting reference to other objections to the admissibility of this testimony, it is deemed sufficient to say that it nowhere appears in the evidence that the defendant made the statement to the little girl that she was a negro, or that he caused it to be made. The fact that such a statement was made to the daughter was therefore inadmissible in evidence. Moreover, the father did not claim to know that the statement was in fact made to his daughter by anyone. The testimony of the father as to such statement was purely hearsay and hence also inadmissible. There was error, therefore, in the admission of such testimony.

That it was error prejudicial to the defendant is obvious. The dramatic effect of the recital before the jury by the father and plaintiff of such a dialogue between himself and his little daughter could not have been otherwise than to have caused an enhancement of the damages—a result highly self-serving to such plaintiff. It was, therefore, reversible error.

2. Upon the trial of the case, the little daughter of the plaintiff above referred to was allowed to testify as a witness for the plaintiff, over the objection of the defendant, to the following statement:

"That * * * Mr. Mopsikov's (defendant's) little girl called her a nigger doll; that she came home and told her father that Mr. Mopsikov's little girl called her a nigger

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doll; that Mr. Mopsikov's little girl calls her a nigger doll whenever she sees her."

The admission of this testimony was reversible error, for the reasons above indicated, because it presented to the jury a statement to the plaintiff's daughter which was not made by the defendant, nor caused to be made by him, so far as appears from the record. There is no evidence in the case tending to show that Mopsikov caused such a statement to be made by his child. The mere relationship of father and child did not make him legally responsible for the tort of his child. Such testimony, therefore, merely presented to the jury another dramatic dialogue between the plaintiff-father and his little daughter, admirably suited to enhance the plaintiff's recovery of damages, but in no way necessitated by the defendant, so far as is disclosed by the evidence properly in the case.

3. The refusal of the trial court to give the following instruction, asked for by the defendant, is the basis of another assignment of error, namely:

"The court instructs the jury that if they believe from the evidence that the defendant did not originate the alleged slander that that should be considered in mitigation of damages."

The authorities on this subject are conflicting. 17 R. C. L. section 211. The weight of authority is in favor of the view that if the defendant did not originate the slander, that is a circumstance which should be taken into consideration by the jury along with all the other evidence in the case, on the question of the presence or absence of actual malice, as distinguished from malice in law, in the speaking of defamatory words. At the same time, a defamatory statement not originated by him who repeats it, but one known by the latter to be false when he repeats it, may be as malicious as if originated by the slanderer. Hence, the isolated fact, if it be a fact, that the defendant did not

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originate the slander, may or may not mitigate the damages in a particular case. Again: This instruction is on the subject of the weight of evidence, on which a trial judge must, under our practice, be particularly watchful and guarded in the matter of giving instructions to the jury, so as not to invade the rightful province of that important component part of the court.

Therefore, while the instruction may be said to embody a sound abstract proposition of law, we are of opinion that it was not error to refuse to give it to the jury in the form proposed in the instant case.

If there should be another trial of this case, and there should be evidence in behalf of the defendant tending to show that the defendant did not originate the alleged slander (as there is in the record before us), we think the trial court should refuse to give any instruction on the subject under consideration unless the defendant introduces evidence tending to prove on what information he based his statement, from whom it was received and under what circumstances, as bearing on the defendant's *bona fide* belief of the truth of his statement; that if such evidence should tend to show such a *bona fide* belief at the time the defamatory words were spoken, an instruction on the subject under consideration should be given if asked; and that the instructions in such case given by the trial court on the subject should avoid singling out the circumstance of the non-originating of the slander by the defendant; it should refer to that as merely one of the facts or circumstances to be considered by the jury along with all the other facts or circumstances in the case as bearing on the presence or absence of actual malice in the utterance of the slander; should avoid the statement that such evidence may be considered by the jury "in mitigation of damages;" and should otherwise avoid infringing upon the province of the jury as sole judges of the credibility of the witnesses and of the weight and effect to be given to the evidence on questions of fact.

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4. The remaining assignments of error concern the giving by the trial court of instructions 1, 2 and 3 for the plaintiff. These instructions were as follows:

"No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff is a white man and that the defendant used the words in the declaration mentioned in bad faith and with malice and that such words from their usual construction and common acceptation, are construed as insults and tend to violence and breach of the peace, then the jury must find for the plaintiff. And in assessing his damages, they may not only give him damages for the insult, and damages to compensate for any injury done to him or his business as shown by the evidence, but damages also to punish the defendant for his act and to deter others, but said damages shall not exceed $10,000, the amount named in the declaration in this action.

"No. 2. The court instructs the jury that if from the evidence they believe that the words contained in the declaration were used by the defendant, and were untrue, and if they further believe from the evidence that the defendant has reiterated the said words, then this is a circumstance tending to show malice on the part of the defendant.

"No. 3. The court instructs the jury that they must find for the plaintiff if the defendant used, with bad faith and malice, the words in the declaration contained, even though the defendant may have heard the plaintiff was a negro, and such statement was untrue."

There are three objections urged by defendant against instruction No. 1, which are stated in their order below:

(a) That the instruction was erroneous because it referred the jury to the declaration "to determine what words were used by the defendant and it further assumes that the defendant used the words in the declaration mentioned, because it provides if the jury believes that he did so use them in bad faith and with malice they must find for the plaintiff."

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It is deemed sufficient on this point to say that we think the instruction plainly referred the questions of fact to the jury, both whether the defendant used the words in the declaration mentioned, and whether he used them "in bad faith and with malice," and did not assume that the defendant used such words.

(b) That the instruction was erroneous because it contained the peremptory command that if the jury believed that the alleged words were used and "that such words from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, that the jury *must* find for the plaintiff—the point being that the words may not have been so intended in meaning by the defendant or so understood by the plaintiff and all others who may have heard them. And the case of *Michaelson* v. *Tuck*, 79 W. Va. 31, 90 S. E. 395, holding that the giving of practically the same instruction as that we have under consideration in a slander case, under the same statute as our Virginia statute on the subject, was error, is urged upon our consideration. In that case, however, there was defense made that the alleged defamatory words were not spoken with a meaning in accordance with their usual construction or common acceptance, but in a joke and in such a manner as to be so understood by the plaintiff and all who may have heard them spoken. In such a case the words used would not constitute slander at common law or under the statute. 1 Barton's Law Pr., page 194. Such, however, is not the case before us. In the instant case there was no such defense nor any defense that the words were not used in accordance with their usual construction and common acceptation. Indeed, the defendant expressly admitted so using them. Hence, there is no merit in the objection under consideration to the instruction given in the instant case.

(c) That the instruction is erroneous because it permits

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the jury to compensate the plaintiff for an injury done to him in his business, upon mere proof of general loss in such business, without any special, specific damage being shown by the evidence.

The words alleged in the declaration were proved to have been spoken as alleged. They were actionable *per se* under the statute in Virginia on the subject. *Spencer* v. *Looney,* 116 Va. 767, 82 S. E. 745. In such case no averment or proof of special damage is necessary. 1 Barton's Law Pr., page 193. The declaration alleged that the words affected the plaintiff's business. If so, they were actionable *per se* at common law also and a general allegation and general proof of damages to the plaintiff's business was sufficient to sustain a finding by the jury of such damages without averment or proof of special damage to such business. *Idem,* pages 190, 191-2; 17 R. C. L., section 198. Hence, we find no merit in this objection to Instruction No. 1.

The objections by defendant to Instructions Nos. 2 and 3 are only that they are both amenable to the first ground of objection, (a) above noted, to Instruction No. 1, and that Instruction No. 3 is amenable to the additional criticism which is the second ground of objection to Instruction No. 1, (b) above noted, with respect to the use of the word "must" therein. What is said above disposes of such objections.

Therefore, we are of opinion that there was no error in the giving of the Instructions Nos. 1, 2 and 3 at the request of the plaintiff.

For the errors noted above, however, and for the reasons there given, we are of opinion to set aside and annull the judgment complained of and to grant a new trial to the defendant, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Richmond.

MORRISETTE v. THE COOK AND BERNHEIMER COMPANY AND OTHERS.

March 21, 1918.

1. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Husband and Wife.*—As a matter of public policy, conveyances by husband to wife, where the husband is indebted, are presumed to be fraudulent, because of the temptation to commit frauds upon creditors and the ease with which they may be perpetrated, and this presumption must be overcome by evidence. Where a husband who is indebted conveys his property to his wife, the wife must prove the good faith of the transaction by clear and satisfactory evidence. If the deed be tainted with actual fraud, it is void as to all creditors, whether existing or subsequent. When post nuptial settlements are assailed by creditors, they must be upheld by proof; and the answer of the wife is not evidence, but must be sustained by proper proof.
2. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Husband and Wife.*—Code of 1904, section 2459, provides that conveyances which are not upon consideration deemed valuable in law, or which are upon consideration of marriage, shall be void as to existing but not as to subsequent creditors. Section 2458 provides that every conveyance given with intent to delay, hinder, or defraud creditors, shall be void. A husband conveyed to his wife all his real estate, reciting the consideration to be the sum of five dollars and other valuable considerations. The husband was engaged in business, and at the time of the conveyance was indebted to others, and at the time of his death his indebtedness had increased. Upon suit by the husband's creditors to set aside the deed as fraudulent the wife contended that the conveyance was voluntary and not based upon valuable consideration, and that therefore the conveyance was not void as to subsequent creditors.

   Held: That the burden of proof was upon the wife and that the false and deceptive recital of a valuable consideration in the deed did not shift the burden of proof to creditors whose debts were contracted after the conveyance.
3. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Section 2459 of the Code of 1904—Proof of Fraud.*—A gift of a chattel being with-

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out valuable consideration is always void as to existing creditors of the donor; but as to subsequent creditors actual fraud must be proved. The voluntary character of the transaction may be one element in the proof of fraud, but not sufficient proof, because the statute says it shall not be.

4. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Section 2459 of the Code of 1904—Proof of Fraud.*—In the case at bar a husband who was indebted at the time made a conveyance to his wife, which was in fact voluntary though it falsely purported to be for a valuable consideration. The husband was engaged in a business which was to be prohibited by law within eighteen months. His fixtures and business stand were, therefore, depreciating in value, while his debts, instead of diminishing, materially increased soon after the conveyance, and the evidence submitted did not clearly and satisfactorily prove that the grantor had reserved sufficient property to pay his debts.

Held: That this was not merely a voluntary conveyance under section 2459 of the Code of 1904.

5. HUSBAND AND WIFE—*Fraudulent and Voluntary Conveyances.*—In a suit properly instituted by subsequent creditors, it appeared that a husband, indebted at the time, conveyed the major portion of his property to his wife, by a deed which falsely recited a valuable consideration, the amount of which was not disclosed by the deed, and which was in fact voluntary.

Held: That in the absence of satisfactory explanation, such facts are sufficient to sustain a decree that the conveyance was fraudulent and hence void as to subsequent creditors.

6. APPEAL AND ERROR—*Affirmance.*—An appellate court will not reverse the decree of a trial court, which is entitled to great weight, unless satisfied that it is wrong. The burden is upon the party complaining to show error and to satisfy the appellate court of such error.

Appeal from a decree of the Circuit Court of city of Norfolk. Decree for complainants. Defendant appeals.

Affirmed.

The opinion states the case.

N. T. Green and *Thos. H. Willcox, Jr.*, for the appellant.

G. M. Dillard and *Alfred Anderson*, for the appellees.

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PRENTIS, J., delivered the opinion of the court.

On March 27, 1915, T. N. Morrisette conveyed to his wife, Alvilla Morrisette, the appellant, all of his real estate in the city of Norfolk, said to be of the value of $2,280, reciting the consideration to be "the sum of five dollars in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations." The property was conveyed with general warranty, and the deed contained the usual covenants of title. This deed was attacked by the appellees, creditors of Morrisette, upon the ground that it was made upon consideration not deemed valuable in law, was voluntary, and made with intent to hinder, delay and defraud his creditors. The bill alleged that the conveyance deprived Morrisette of the means of paying his debts, prevented his creditors from resorting thereto for the payment of his debts, and caused him to become and remain insolvent.

Morrisette conducted a bar room in Norfolk, and at the time of the conveyance was indebted to three of the appellees in the sum of $637.57. At the time of his death, a little over ten months later, his indebtedness to these creditors amounted to $1,084.96. After the conveyance and until his death, Morrisette continued his business, purchasing more goods from them and making payments on their running accounts, and this suit was instituted to recover the balance due thereon. At his death, as appears from the inventory, his entire estate consisted of his bar fixtures and stock, appraised at $321; one horse and buggy, at $150; and cash in bank $6; aggregating $477.

The trial court decreed the conveyance to be null and void, and set it aside upon the ground that it was not made upon consideration deemed valuable in law, and that it was made with intent to hinder, delay and defraud the creditors of Morrisette. From that decree this appeal was taken.

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The contention for the appellant is that the conveyance was voluntary and not based upon valuable consideration, she having so admitted in her answer to the bill, that the debts were contracted at a date subsequent to such conveyance, and that the evidence does not justify the decree of the court that the conveyance was fraudulent; and therefore, under section 2459 of the Code, the bill should have been dismissed.

Section 2459 thus relied upon provides: "Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors, whose debts shall have been contracted at the time it was made, but shall nto, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers."

The claim of appellant rests, then, upon the proposition that this is merely a voluntary deed, and that though void as to creditors whose debts were contracted before it was made, in the absence of actual proof of fraud, it is valid as to creditors whose debts were contracted after the conveyance.

On the other hand, the claim of appellees is, that the deed is not merely voluntary but actually fraudulent, and therefore void as to them under section 2458, which provides that, "Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully

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entitled to, shall, as to such creditors, purchasers, or other persons, their representatives, or assigns, be void."

The controlling question is, whether under the facts recited the decree should be in favor of the creditors alleging the fraud, or in favor of the wife claiming that there was no fraud. There are certain well-established doctrines affecting the question, which are admitted by all: Among them are, that such transactions between husband and wife, as a matter of public policy, are presumed to be fraudulent, because of the temptation to commit frauds upon creditors and the ease with which they may be perpetrated; and that this presumption must be overcome by evidence; that where a husband who is indebted conveys his property to his wife, the wife must prove the good faith of the transaction by clear and satisfactory evidence; that if the deed be tainted with actual fraud, it is void as to all creditors, whether existing or subsequent; that when post nuptial settlements are assailed by creditors, they must be upheld by proof; and that the answer of the wife is not evidence, but must be sustained by proper proof. *Darden* v. *Ferguson*, 2 Va. Dec. 496, 27 S. E. 435; *Fink Bro. & Co.* v. *Denny*, 75 Va. 668; *Johnson* v. *Wagner*, 76 Va. 590; *Witz, Biedler & Co.* v. *Osburn*, 83 Va. 230, 2 S. E. 33; *Rixey's Adm'r* v. *Deitrick*, 85 Va. 45, 6 S. E. 615; *Crowder* v. *Garber*, 97 Va. 567, 34 S. E. 470; *Runkle* v. *Runkle*, 98 Va. 664, 37 S. E. 279; *Robinson* v. *Bass*, 100 Va. 190, 40 S. E. 660; *Lee* v. *Willis*, 101 Va. 191, 43 S. E. 354; *Baker* v. *Watts*, 101 Va. 707, 44 S. E. 929; *Rankin* v. *Goodwin*, 103 Va. 83, 48 S. E. 521; *Kline* v. *Kline*, 103 Va. 265, 48 S. E. 882; *Richardson* v. *Pierce*, 105 Va. 630, 54 S. E. 480; *Sledge* v. *Reed*, 112 Va. 203, 70 S. E. 523; *Eason* v. *Lyons*, 114 Va. 390, 76 S. E. 957; *Johnson* v. *Ables*, 119 Va. 596, 89 S. E. 908.

In this case the deed did not purport to be a voluntary conveyance, but recited a valuable consideration, and the main contention of the appellant is based upon the fact,

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shown by the admission in the answer, that the deed affirmed a falsehood and concealed the truth, and that notwithstanding its recital of a valuable consideration no consideration passed.

If in this case, when the deed was attacked, instead of admitting that the recital of a valuable consideration in the deed was untrue, the grantee had by her answer undertaken to sustain the deed by alleging that she had paid full value for the property conveyed, then by an unbroken line of decisions it is clear that the burden would have been upon her to establish that fact. The proposition here is, that because of the circumstance which the law infers in the absence of proof to the contrary and which fact she admitted in her answer, namely, that the recital of a valuable consideration in the deed the amount of which was undisclosed, was false and deceptive, therefore the burden of proof changes as to creditors whose debts were contracted after the conveyance. It is doubtless true under section 2459, that if there is nothing before the court except a voluntary conveyance, then that such a conveyance cannot be successfully attacked by subsequent creditors.

Counsel for the appellant argue with convincing force that by virtue of section 2459 subsequent creditors cannot prevail when they attack a conveyance which is merely voluntary and not fraudulent. Dr. Lile, in his Notes to Volume 3, Minor's Institutes, on page 26, thus construes the section: "Hence, at present with us, a gift of a chattel being without valuable consideration is always void as to existing creditors of the donor; but as to subsequent creditors actual fraud must be proved. The voluntary character of the transaction may be one element in the proof of fraud, but not sufficient proof, because the statute says it shall not be." *Pickrell* v. *Reynolds* (Chancery Court, city of Richmond), 6 Va. Law Journal (May, 1882), 308; *Lockhard* v. *Beckley*, 10 W. Va. 88; *Greer* v. *O'Brien*, 36 W. Va.

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277, 15 S. E. 74, and *Peale* v. *Grossman*, 70 W. Va. 1, 73 S. E. 46, Ann. Cas. 1913 C, 1373, also sustain this view.

The evidence here, however, shows much more than a conveyance which is merely voluntary; that is, we have a conveyance to his wife from a grantor who was indebted at the time, which was in fact voluntary though it falsely purported to be for a valuable consideration, such debtor being engaged in a business which was to be prohibited by law within about eighteen months (because it had then been determined that the sale of intoxicating liquors would be prohibited in the State on the 1st of November, 1916); his bar fixtures and business stand were therefore depreciating in value, while his debts, instead of diminishing, materially increased soon after the conveyance, and as the trial judge determined the evidence submitted does not clearly and satisfactorily prove that the grantor had reserved sufficient property to pay his debts.

In *Greer* v. *O'Brien, supra*, which is among the cases relied on by the appellant, this is said: "This proposition must be taken in connection with the facts of the case itself (referring to *Rogers* v. *Verlander*, 30 W. Va. 651, 5 S. E. 847), as set out in the opinion, which disclose that the deed assailed purported to be for valuable consideration, and was not on its face a voluntary conveyance; thus obviously indicating on the part of the grantor an intent to withdraw from the reach of existing creditors all the property so conveyed. As applied to the case then in hand, therefore, the proposition is correct, because the misrepresentation on the face of the deed supplied that 'additional circumstance' of covin which, as we have seen, was insisted upon in *Lockhard* v. *Beckley, supra* (10 W. Va. 87), in which it was held that mere indebtedness at the time of making a dead, voluntary on its face, is not a circumstance to impeach the deed, except when accompanied by other badges of fraud."

We have, then, in this case this particular badge of fraud, this additional circumstance, in a transaction by which a

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husband, indebted at the time, conveys the major portion of his property to his wife, by a deed which falsely recites a valuable consideration, the amount of which was not disclosed by the deed, and which was in fact voluntary. Such facts appearing in a suit promptly instituted by subsequent creditors, in the absence of satisfactory explanation, are sufficient to sustain a decree that the conveyance is fraudulent and hence void as to such subsequent creditors.

In the case of *Eason* v. *Lyons,* 114 Va. 390, 76 S. E. 957, there was a deed from a husband to a wife which was voluntary on its face, and the wife attempted to sustain it by showing that it was in fact a conveyance of her own property for which she had furnished the purchase money, and this court determined that the burden was upon the wife. Here we have a deed purporting to be for a valuable consideration, which the wife discredits by admitting that it was voluntary. If such an admission can change the burden of proof in such cases, then an easy way to defeat subsequent creditors, even where there is actual fraud, has been discovered. Under the circumstances of this case, the conveyance to Mrs. Morrisette, in the absence of satisfactory proof to the contrary, must be held to be tainted with fraud, and therefore void both as to existing and subsequent creditors. The burden was upon her to repel the presumption arising out of the admitted facts. Even if we had doubt about this, however, the case should be affirmed, because of the salutary doctrine that an appellate court will not reverse the decree of a trial court, which is entitled to great weight, unless satisfied that it is wrong. The burden is upon the party complaining to show error and to satisfy the appellate court of such error. *Shipman* v. *Fletcher,* 91 Va. 487, 22 S. E. 458; *Smith* v. *Smith,* 92 Va. 696, 24 S. E. 280.

For the reasons indicated, the decree will be affirmed.

Affirmed.

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SIMS, J., dissenting:

I regret to say that I cannot concur in the majority opinion.

On the facts of the case, the opinion leaves out of view the following important circumstances, namely: At the time the deed in question was made the grantor still owned his saloon business, stock and fixtures therein and a lease thereon which had eighteen months to run. According to the uncontradicted testimony for appellant, on April 1, 1915, after the deed aforesaid was made, the lease was worth about $2,000 over and above the rental payable thereunder, and the grantor then owned also his fixtures, his usual stock of liquors and his horse and buggy. The grantor's indebtedness then being only $637.57, the evidence in the case clearly shows that he retained in his hands at the time he made said deed ample property to pay his debts. That while it is true that it was known that the saloon business could not be continued longer than November 1, 1916, still there was every prospect of a thriving business in that line being done up to such date. That, hence, there was reasonable prospect that the grantor would make more than sufficient to pay his debts between the making of the deed and November 1, 1916. That his credit was good and remained so after the making and recording of said deed. That there was no evidence that either he or any of his creditors contemplated his future insolvency at the time the deed was made and recorded. Indeed the evidence all points to the contrary. No consideration is given in the majority opinion to the fact that the unanticipated death of the grantor about ten months after the making of the deed cut short his business activities and prevented his personal attention to the continuance of his business to November 1, 1916, and to the closing out of same at that time and the disposition of his assets, which may have brought about a very different result from that shown by the inventory of his assets after his death.

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However, if the judge of the court below had rested his decision on the ground that he was of opinion from the evidence that an actual intent on the part of the grantor to defraud existing creditors existed at the time the deed in question was made, there would be great force in the position taken at the conclusion of the majority opinion, since there was in the case before us the circumstance of covin that the deed purported on its face to have been made for a valuable consideration, which might be said to be a false statement, and the grantor thereafter increased instead of diminishing his indebtedness. The courts have found it impossible to establish any standard by which fraud is to be measured. Each case must be considered upon its own facts, and the judgment of a chancellor upon the facts of a case is entitled to great weight; the appellate court will not reverse the decision of the court below unless satisfied that it is wrong; and "the burden is upon the party complaining to show error and to satisfy the appellate court of such error"—as stated in the majority opinion.

But in the case before us, we cannot rest the case upon the presumptions in favor of the correctness of the decision of the chancellor in the court below upon the issue as to whether an actual fraudulent intent as against existing creditors existed on the part of the grantor at the time of the making of the deed in question, since it affirmatively appears from the opinion of the court below in the record that he did not rest his decision on that ground. Such opinion is as follows:

"In this cause I am of opinion that the grantor in the conveyance did not retain in his hands ample funds or property to pay his obligations (*i. e.*, it did not clearly so appear).

"I am further of opinion that where the grantor in the conveyance was indebted at the time he made the conveyance, the transaction is void as to existing creditors and *prima facie* void as to subsequent creditors. This I under-

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stand to be the Virginia doctrine. I will therefore enter a decree for the complainants."

Now, as we have seen above, the facts in the case before us do not sustain the first position taken in such opinion; and, as correctly pointed out in the majority opinion, the second and only remaining position taken in such opinion cannot be sustained. On neither ground, therefore, upon which the judge of the court below decided the cause can the decree complained of be upheld by us.

Further: While courts have found it impossible to establish any standard by which fraud may be always measured, they have firmly fixed one rule on the subject and that is that fraud must not only be distinctly alleged but as distinctly proved. Now if fraud in the making of a conveyance, such as that involved in the cause before us, can be proved by the plaintiffs, who are subsequent creditors of the grantor, by merely showing the existence of two bare facts, namely, (1) that the deed stated a valuable consideration, instead of showing on its face that it was voluntary, and (2) that the grantor after the making of the deed got in debt, then fraud may be established upon very scant proof indeed. The second fact mentioned is just as consistent with good faith as with fraud. This leaves only the first fact alluded to as the sole circumstance upon which the inference of fraud could be based. The statute, section 2459 of the Code, negatives such inference being drawn from that single circumstance.

The court below, therefore, was manifestly right in not resting its decision on the ground that the evidence in the cause proved an actual fraudulent intent on the part of the donor. For the same reason I do not think we can properly rest the case on that ground and thus sustain the decision of the court below. The majority opinion rests an affirmance of the cause upon another ground, as involving the controlling question in the case, namely (in substance),

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that the burden of proof is upon the wife, who was grantee in the deed in question, to show "that there was no fraud;" and a number of Virginia decisions are cited in such opinion to sustain the position taken that such burden rests upon the wife claiming under a deed from her husband, as in the case before us. But with the utmost deference, I must say that an examination of those cases, as I construe them, discloses that the extent of their holding is that the presumption against the wife in respect to such a deed goes no further than to the question of the consideration for it. That is to say, a conveyance from a husband to a wife is presumed to be voluntary as to existing creditors. Those authorities seem to go no further than that holding. All of those authorities involve only the question of consideration. It appears from the express statements in most of such decisions themselves that the presumption against the wife extends only to the question of the existence of a valuable consideration for the conveyance. As stated in *Witz, Biedler & Co.* v. *Osburn* (one of the cases cited in the majority opinion), 83 Va. 227, at page 230, 2 S. E. 33, 34: "The deed * * * is therefore a post nuptial settlement on the wife, voluntary, and *therefore* fraudulent and void as to existing debts, but not as to subsequent debts, unless actually fraudulent. If tainted with actual fraud, it is void as to subsequent debts." (Citing a number of Virginia cases—italics supplied.) See also *Irvine* v. *Greever*, 73 Va. (32 Gratt.) 411, 418, for the same holding. And, as above indicated, in all of the Virginia cases cited in the majority opinion in which the presumption against the wife was applied, the attack upon the conveyance in question was made by existing creditors of the grantor and the presumption was applied only to the extent of the consideration.

But, if it were conceded that when a case may be presented to this court where a conveyance from a husband to

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wife is assailed by creditors existing at the time of the conveyance, on the ground that an actual fraudulent intent on the part of the grantor existed at the time the conveyance was made, this court may hold that the burden of proof would be on the wife, not only to show a valuable consideration moving from her, but also to negative the existence of such fraudulent intent which might otherwise be inferred from any and *all other* particulars besides that of the presence or absence of a valuable consideration (and I can see that there may be a good and sufficient reason for so holding); still, it is well settled, as *above* noted, that *as to subsequent creditors* no presumption of fraud exists against the wife, and no burden to negative it in any particular rests upon her. (*Witz, Biedler & Co.* v. *Osburn, supra.*) As said in the opinion of this court delivered by Judge Whittle in *Richardson* v. *Pierce,* 105 Va. 628, 631, 54 S. E. 480, 481: "On the other hand, where the husband is not indebted at the time of the transaction, no such presumption arises; and the burden of proof is upon the subsequent creditor to show that a prospective fraud was contemplated and directed against him; and this principle applied also to voluntary settlements by the husband upon the wife. *Hutchison* v. *Kelly,* 1 Rob. 131, 39 Am. Dec. 250; *Bank* v. *Patton,* 1 Rob. 528; *Johnston* v. *Gill,* 68 Va. (27 Gratt.) 587; *Witz, Biedler & Co.* v. *Osburn, supra; DeFarges* v. *Ryland & Brooks,* 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; *Building Association* v. *Reed,* 96 Va. 345, 31 S. E. 514."

Therefore, the fact that the deed in the case before us was made to a married woman does not distinguish the case from other cases governed by section 2459 of the Code of Virginia. And the rule is, as admirably stated by Prof. Lile and quoted in the opinion of the majority of the court, "* * * as to subsequent creditors actual fraud must be proved. The voluntary character of the transaction may

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be one element in the proof, but not sufficient proof, because the statute says it shall not be." That is to say, the burden of proof is on subsequent creditors to prove the existence of an actual fraudulent intent in the grantor at the time he made the deed in question.

It is true, as appears from the quotation above from the case of *Witz, Biedler & Co.* v. *Osburn, supra* (and from many other Virginia cases), if there were existing debts at the time the deed in question was made (as was true of the case before us), but such debts are not asserted in the suit seeking to set aside the deed, yet if an actual fraudulent intent on the part of the grantor is shown to have existed as against such existing debts at the time the deed was made, the deed will be held to have been tainted with actual fraud and to be actually fraudulent as to subsequent creditors who may assail it. But as to subsequent creditors, the burden is on them to prove the existence of actual fraudulent intent as to debts which may have existed at the time the deed in question was made.

Now, on the question whether the appellees, seeking to set aside the deed to appellant, are subsequent or existing creditors: If the payments made on those debts were applied *by such creditors* to the oldest debts on those accounts, they are subsequent creditors and not creditors whose debts existed at the time the deed was made which they seek to have set aside as voluntary and fraudulent as to them.

By entering such payments in accounts current, rendered by them, with items of debit and items of credit dated, the creditors in the case before us themselves applied the payments made on account to the oldest items of debt and this left no room for contention that as matter of fact the debts they asserted by the bringing of the suit before us were debts in fact existing at the time the deed in question was made. *Clayton's Case*, 1 Merivale, 609-611, 3 Eng. Ruling Cas. 329; *Deeley* v. *Lloyd's Bank, Ltd.*, App. Cas. (1912),

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page 756; *Sherry's Case*, 25 Cy. Div. (Eng.) 672, 692; *Peale* v. *Grossman*, 70 W. Va. 1, 73 S. E. 46, Ann. Cas. 1913 C, 1373.

It is true that in a number of jurisdictions where it seems there is no such statute as that in Virginia above quoted, it is held that: "In case of running accounts, the earliest indebtedness being paid by the proceeds of the later, the continuing indebtedness stands upon the same footing as an indebtedness existing at the time of the conveyance * * *" (20 Cyc. 422.) To the same effect *Spuck* v. *Logan*, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427. Such a holding in Virginia would be in direct conflict with said statute (section 2459 of Code of Virginia), which, as said in *Peale* v. *Grossman, supra*, with respect to the West Virginia statute, the same as the Virginia statute." * * * The statute defines who is a prior creditor and who is not. By the terms of the statute a creditor's relation to a voluntary conveyance is fixed only by the time of the contracting of the debt. It does not permit making a creditor what he has not made himself in this regard." It seems clear, therefore, that such authorities relied on by appellees should have no weight with us upon the question under consideration.

I am, therefore, constrained to the opinion that the decree complained of should be set aside and annulled, and a decree of this court entered sustaining the deed in question.

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Syllabus.

Richmond.

NORFOLK AND WESTERN RAILWAY COMPANY v. A. C. ALLEN AND SONS.

March 21, 1918.

1. NEW TRIAL—*Motion Before Law Judge not Before Chancellor.*—In a court which has both common law and chancery jurisdiction, and in which the same judge administers both, it is immaterial before which branch of the court a motion to set aside the verdict upon an issue out of chancery and award a new trial is made.
2. APPEAL AND ERROR—*Issue of Fact—Depositions—Evidence.*—In a suit for damages for diminution of water power, where an issue to a jury was awarded to determine the amount of damages to be awarded to the plaintiffs for the injuries sustained, the Supreme Court of Appeals will not treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions.
3. APPEAL AND ERROR—*Reversal—Finding of Jury.*—In a case where there was no certain standard for the admeasurement of the damages to be assessed, and there was serious conflict in the testimony as to the amount of the damages inflicted, an issue of fact was awarded. The sole question submitted to the jury was the amount of damages to be awarded the plaintiffs for the injury sustained and to be sustained, by reason of the acts done and proposed to be done by the defendant. No other question was submitted to them. Their assessment of the damages was approved by the trial court, and where this is the case, and no error is pointed out in the action of the court or the conduct of the case, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it.
4. DAMAGES—*Mitigation of Damages.*—In a suit for damages for diminution of plaintiffs' water power by defendant, evidence was properly excluded as to how the injury done by the defendant to the plaintiffs might have been minimized in the past, as no one is under obligation to undertake to minimize a threatened or an intermittent voluntary trespass.
5. DAMAGES—*Mitigation of Damages—Trespass.*—The owner of

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property is not obliged to so use his own property that another may not injure it. If an injury is merely threatened, no action lies for the threat, and the property owner is under no obligation to attempt in advance to minimize the results of a wrong which may never be inflicted. If the injury is intermittent and recurrent, entire damages cannot be recovered in a single action, as the injury may never be repeated, and for that reason there is no duty resting upon the party injured to attempt to minimize its consequences. But where the injury is permanent in its character and continuous in its consequences, entire damages may be recovered in a single action, and the duty rests upon the injured party to minimize its consequences if it can be done at moderate expense and by the exercise of ordinary care.

6. TRESPASS—*Eminent Domain.*—A railroad company is no less a trespasser when it diminishes the water power of a mill owner because it intended to exercise its right of eminent domain than if it entertained no such intention.

7. TRESPASS—*Eminent Domain—Duty of Landowner—Minimizing Damages.*—In such a case every time it diminished the plaintiffs' supply of water to their detriment it committed a new trespass, and while the nature of its pumping station indicated that it would probably continue to trespass upon the plaintiffs' property, the latter were under no obligation to presume that it would continue to do so, without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them.

8. DAMAGES—*Trespass—Eminent Domain—Measure of Damages.*—In a suit by a mill owner against a railroad for damages for diminution of his water power, the case stood in all essential particulars, so far as the measure of damages was concerned, as a proceeding to condemn the water for the use of the defendant, and the measure of damages is the difference between the market value of the mill property before and after the injury. The damages should not be based on the evidence of the amount of the horse-power lost, and an estimate of the value of that horse-power at the mill by comparing the horse-power at another place, and under different conditions, and a calculation of what sum put at interest at six per cent. would produce an income equivalent to that loss.

9. EXEMPLARY DAMAGES—*Argument of Counsel—Going Outside of the Record.*—In a case in which exemplary or punitive damages are properly allowable, evidence of the wealth of the defendant may be introduced, and such evidence is a legitimate

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subject of proper comment, for what would be punishment to a poor defendant would be no punishment at all to one of wealth and affluence. But it is never permissible for counsel to go outside of the record and testify as to matters not given in evidence, nor, in any case, to make use of language calculated to inflame the minds of the jurors and induce a verdict not founded solely on the evidence adduced before them.

10. ARGUMENT OF COUNSEL—*Statements Calculated to Inflame the Minds of Jurors.*—The Supreme Court of Appeals has more than once reprobated in no uncertain terms the practice of injecting into arguments of counsel statements calculated to inflame the minds of jurors, and tending to produce verdicts as a result of prejudice rather than a calm consideration of the evidence. Every litigant, natural or artificial, is entitled to a fair and impartial trial, and there should be excluded from the tribunal which is to try the case, whether judge or jury, everything that has no tendency to aid such tribunal in doing impartial justice between the litigants.

11. ARGUMENT OF COUNSEL—*Financial Standing of Defendant.*—In an action against a railroad company for diminution of plaintiffs' water power, there was no evidence before the jury as to the wealth of the defendant, but counsel for plaintiffs in his address to the jury was allowed to comment over defendant's objections upon the great wealth of the defendant and its disregard of the law of God and man.

Held: Error.

12. WATERS AND WATERCOURSES—*Diminution of Water Power—Exemplary Damages.*—In the case at bar the defendant railroad company continued the diminution of plaintiffs' water supply, after a judgment for plaintiffs was affirmed by the Supreme Court of Appeals. The evidence in the case, however, did not show that the railroad company was actuated by malice, wantonness or oppression, or that there was any fraud on its part, or that it was guilty of any gross negligence or recklessness, or that its action in continuing to take the water, after the order of the Supreme Court of Appeals had been certified to the circuit court, until arrangements were made to settle the controversy, evinced any intention on the part of the railroad company to disregard the rights of the plaintiffs, or to defy the law of the land. Unless one or the other of these situations existed, the plaintiffs had no right to recover punitive damages.

Appeal from a decree of the Circuit Court of Prince Edward county. Decree for complainants. Defendant appeals.

Reversed.

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The opinion states the case.

F. S. Kirkpatrick, for the appellant.

E. Warren Wall and *W. M. Justis, Jr.*, for the appellees.

BURKS, J., delivered the opinion of the court.

The facts of this case are as follows: Prior to 1901 the railroad company had been taking water from Lockett's creek with a pump having a five-inch intake and four-inch discharge pipe. About 1901 or 1902 it changed the location of its tank and pumping-station, and also increased the pipes connected with the pump, so as to have a six-inch intake and five-inch discharge pipe. In 1901 the Allens bought a mill site on the creek below the pumping-station and erected thereon and equipped a mill for grinding wheat and corn, and sawing lumber. It is not claimed that the water taken from the creek at that time or at any time prior to 1907 in any way injured Allen & Sons. The pumping-station was lawfully erected for the purpose of supplying the needs of the company, and it continued to take the water as formerly from the creek. In 1907, however, the traffic on the railroad increased to such an extent that it was necessary to take more water from the creek, and from 1907 to 1912 it was claimed that the water taken from the creek so diminished the supply as greatly to injure Allen & Sons, and in the latter year they brought an action at law against the railroad company to recover damages for the previous five years, and also filed a bill for an injunction to enjoin the railroad company from further taking water from the creek. As the railroad company was a public service corporation, and the water was necessary for its purposes the injunction was denied, but the case was continued on the docket. At the trial of the action at law there

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was a verdict and judgment in favor of the plaintiffs for $4,000. To this judgment a writ of error was awarded by this court, and, on the hearing, the judgment of the trial court was affirmed. A petition for a rehearing was filed and the case was reheard and decided January 13, 1916, reaffirming the judgment of the trial court. The principal question then involved was whether or not the injury done to the plaintiffs was permanent and continuous, or was intermittent, and it was held by this court that the injury inflicted on the plaintiffs did not consist in the installation of the pumping machinery, but in taking the water from the stream, and as this might be stopped at any time, and was intermittent at all times, entire damages could not be recovered in one action, but that each successive unlawful taking of the water gave the plaintiffs a new cause of action. *Norfolk & Western R. Co.* v. *Allen*, 118 Va. 428, 87 S. E. 558.

The judgment of this court was certified to the circuit court in February, 1916. On August 24, 1916, Allen & Sons instituted a new action against the railroad company to recover, it is said, for the damages sustained since the former recovery, but the declaration is not copied into the record, and we have no means of ascertaining accurately the exact extent of their claim. There was then pending the chancery suit praying an injunction which had been instituted simultaneously with the first action for damages, and this second action for damages.

It was stated by counsel for the railroad company both in his brief and in the oral argument in this court, and not denied by opposing counsel, that at this juncture, the railroad company, which had the right to condemn the water, proposed to institute condemnation proceedings for that purpose, but finding that the suit in equity was still on the docket, as also the second action at law, and that complete justice might be done in those cases and a multiplicity of

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actions avoided, proposed that the whole question should be settled by issues to be ordered in the chancery suit. The suggestion was made therefore to the court that the litigation should take this form. This suggestion was accepted, as appears from the opinion of the circuit court, and thereupon an order was entered in the circuit court on the chancery side, directing "that a jury be empanelled at the bar of this court to report to the court for its consideration in said chancery cause its finding upon the following issues, (1) what sum of money, if any, the plaintiffs should recover as damages for the diversion of the water by the defendant from Lockett's creek, from the third day of July, 1912, to the date of the trial of this issue; and (2) what damages, if any, will the plaintiffs sustain in future by the continued diversion of water by the defendant from said stream."

It will be observed that both of these issues were confined to the actual damages sustained, or to be sustained, by the Allens. Whether or not punitive damages were claimed in the declaration we have no means of knowing, as the declaration is not copied into the record. The subject was not remotely referred to in the order for the issue. In response to these issues, the jury awarded $4,417.00 for the damage actually sustained, and $5,933.33 for the damage to be sustained. These issues were tried on the law side of the court, and the verdict was certified to the court on its chancery side. A decree was entered against the defendant for the amounts in the chancery suit, and it is from that decree that the present appeal is taken.

A number of exceptions were taken to the action of the trial court during the progress of the trial, but it is not deemed necessary to pass upon them all. We shall notice such only as seem to be material and necessary for the guidance of the trial court on another trial.

It is insisted by the appellees that the appellant has no

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standing in this court because the motion to set aside the verdict and award a new trial was made before the law judge and not before the chancellor. The circuit court has both common law and chancery jurisdiction, and the same judge administers both. It is immaterial before which branch of the court the motion is made. This was settled in *Meade* v. *Meade,* 111 Va. 451, 69 S. E. 330, which is very similar to the instant case.

Counsel for the appellant insist that we shall consider this case as an appeal in any other chancery case, and treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions. He says, amongst other things, "your petitioner does not wish this case sent back for further hearing, but asks it may be treated as a chancery cause, and a final decree entered in this court such as should have been entered in the court below." It is an all sufficient answer to this request to say that it was pre-eminently a case for the award of an issue by the trial court, and it would have been error not to have awarded it. The case, in this respect, does not stand on any different footing from other suits in chancery wherein an issue of fact is properly awarded. There was no certain standard for the admeasurement of the damages to be assessed, and there was serious conflict in the testimony as to the amount of the damage inflicted. The sole question submitted to the jury was the amount of damages to be awarded the plaintiffs for the injury sustained and to be sustained, by reason of the acts done and proposed to be done by the defendant. No other question was submitted to them. Their assessment of the damages was approved by the trial court, and where this is the case, and no error is pointed out in the action of the court or the conduct of the case, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it. *Barbour* v. *Melendy & Russell,* 88 Va. 595, 14 S. E. 326, and cases cited.

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Several exceptions were taken to rulings of the trial court excluding the testimony of alleged experts who were offered to show how the injury done by the defendant to the plaintiffs might have been minimized in the past, or might be in the future. As to past injuries the evidence was properly excluded, as no one is under obligation to undertake to minimize a threatened or an intermittent voluntary trespass. The owner of property is not obliged to so use his own property that another may not injure it. If an injury is merely threatened, no action lies for the threat, and the property owner is under no obligation to attempt in advance to minimize the results of a wrong which may never be inflicted. If the injury is intermittent and recurrent, entire damages cannot be recovered in a single action, as the injury may never be repeated, and for that reason there is no duty resting upon the party injured to attempt to minimize its consequences. But where the injury is permanent in its character and continuous in its consequences, entire damages may be recovered in a single action, and the duty rests upon the injured party to minimize its consequences if it can be done at a moderate expense and by the exercise of ordinary care. Compare *Norfolk County Water Co. v. Etheridge*, 120 Va. 379, 91 S. E. 155; *Moberly v. City of Parkersburg*, 66 W. Va. 533, 66 S. E. 750, 29 L. R. A. (N. S.) 860. The owner of a dwelling is under no obligation to remove his furniture therefrom because some one has threatened to burn it, in order thereby to minimize the threatened loss, nor to provide wire screens for windows because through negligence of others a baseball occasionally breaks his glass. In each of these cases the trespasser must pay the entire proximate loss.

The railway company was no less a trespasser because it intended to exercise its right of eminent domain than if it had entertained no such intention. *Norfolk & Ocean View R. Co. v. Turnpike Co.*, 111 Va. 131, 68 S. E. 346, Ann. Cas. 1912A, 1065; *Brown v. Russell*, 88 Va. 826, and cases cited.

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Cal. 1912A, 289. Every time it diminished the plaintiffs' supply of water to their detriment, it committed a new trespass, and while the nature of its pumping-station indicated that it would probably continue to trespass upon the plaintiffs' property, the latter were under no obligation to presume that it would continue to do so without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them. *Norfolk & Western R. Co.* v. *Allen*, *supra*. Had they acted upon such assumption, and the company had ceased to take the water, all sums expended to minimize the loss would have been uselessly expended, without the right of recovery over against any one. The rule is otherwise, however, where the injury is complete and its consequences continuous. In such case the party injured must use reasonable care to protect his property from further injury, provided it can be done at moderate expense. *Stonega Coal Co.* v. *Addington*, 112 Va. 807, 73 S. E. 257, 37 L. R. A. (N. S.) 969. Thus if one should cut a hole in my roof thereby permitting the rain to come in, and I have knowledge of the fact, I must within a reasonable time have it repaired and thereby minimize the loss I would otherwise sustain, else I cannot recover the resulting damage from the trespasser.

We deem it unnecessary to discuss the ruling of the court as to its effect on future damages, as, in our opinion, the case was proceeded with in the trial court on the wrong theory as to the measure of damages in a case of this nature. In this aspect of the case, it stood in all essential particulars, so far as the measure of damages was concerned, as a proceeding to condemn the water for the use of the defendant. On the trial in the circuit court, the plaintiffs were permitted to offer evidence of the amount of horse-power lost, and to estimate the value of that horse-power

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at the mill by comparing the horse-power at another place, and under different conditions and then to calculate what sum put at interest at six *per cent.* would produce that income, and much more evidence of a purely speculative nature.

The plaintiffs filed with their testimony the following statement of their claim for future loss, if no change was made to obtain additional water power.

"Estimated for future loss if mill cannot be successfully changed:

Value of mill as going concern, with good wheel, on basis of five years.....$14,060.00

Additional Profits.

Loss of 2 1-2 h. p. Value of 1 h. p. 54c per day, 1 year $162.00, 2 1-2 h. p. per day for one year,	356.00
Sum necessary to provide $356 at 6%.....	5,933.33
	$19,933.33
Value of mill at present.....	5,000.00
Balance	$14,933.33"

The plaintiffs thereupon claimed as their damages on that account $14,933.33.

Just how that statement was of value to the jury in arris not made so by the evidence of the witnesses, or the argument of counsel, but it need not be further considered. The jury in fact allowed for the future damages $5,933.33. This sum was the exact sum claimed by the plaintiffs as the value of 2.2 horse-power lost, but the price is fixed at 54 cents per day without any fixed data upon which to base it except the opinion of a witness who had no adequate information on the subject. He testified to the value of an electric horse-power furnished in the city of Lynchburg by the

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Lynchburg Light and Traction Co., but was not "able to say what is the value of horse-power at Prospect, at Mr. Allen's Mill," but knew it could not be furnished at the Lynchburg price, because had tried it without success. The estimates of this witness, however, were purely speculative, based upon insufficient data, and their adoption by the jury necessarily resulted in a speculative verdict.

It is not claimed that the water sought to be condemned, in the instant case, is of any special value except as a motive power for the plaintiffs' mill, or that the mill site, or any of the property affected, has any peculiar or prospective value other than its present use. All that the plaintiffs claim is that their mill is damaged by the diminution of the water supply by the acts of the defendant; that they have not the power they formerly had, and that the defendant should either cease to take the water, or else make compensation therefor. This presents the ordinary case of a permanent injury by the defendant to the real estate of the plaintiffs. There are cases where the market value of property is not affected by the trespass complained of, or is even enhanced, and the owner is still entitled to recover (*Virginian R. Co.* v. *London*, 114 Va. 334, 76 S. E. 306), but this is not one of them. In the instant case, the measure of damages is the difference between the market value of the mill property before and after the injury. As the assessment is to be made now of the damages to flow from permission to take the water in the future, the evidence should be confined to the market value, at the present time, of the plaintiffs' mill property with an undisturbed flow of water, and with the flow disturbed as proposed by the defendant. The difference between these sums represents the amount of damage to be sustained by the plaintiffs by the proposed diminution of their water-supply by the defendant. This precise question has not been hitherto passed upon by this court, but the measure of damages stated is

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Opinion.

plainly right, conforms to our holdings on kindred questions and accords with the holdings in like cases in our sister States. In *Norfolk County Water Co. v. Etheridge*, supra, it was held that where a dam causes permanent injury to another's land, the measure of damages is the difference in the market value of the land with and without the dam, to be computed as of the time immediately before the dam was built and immediately after it was finished and filled with water. See also *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Hansen v. C. & O. Ry. Co.*, 107 Va. 158, 59 S. E. 415, 17 L. R. A. (N. S.) 124; *Burger v. State Female Normal School*, 114 Va. 481, 77 S. E. 489; *Virginian Ry. Co. v. Hurt*, 112 Va. 622, 72 S. E. 110; *McHenry v. City of Parkersburg*, *supra*. In 8 Ruling Case Law, p. 481 it is said "the proper measure of damages for permanent injury to real property is the diminution in the market value of the property, and a large number of cases from other States is cited in support of the text. See also 13 Cyc. 150 and cases cited.

This objection to the measure of damages was not made in the trial court or in this court, but the point involved is fundamental. Whether or not the decree of the trial court should be reversed for the error mentioned need not be decided, as the decree has to be reversed on other grounds, but attention is called to it so that the error may not be repeated on any future trial.

There was no evidence before the jury as to the wealth of the defendant or the value of its stock, but during the argument of the issues before the jury counsel for the plaintiffs addressed the following remarks to the jury, which were duly excepted to as follows:

"Gentlemen of the jury: This is a most unusual case, a case without precedent in the annals of Virginia history, in one

in which you may consider not only past and future damages, but exemplary damages, as a deterrent to this and other corporations not to do likewise. In considering what would be a deterrent to a gigantic corporation of this kind, a corporation whose income is far greater than that of its creator, the State of Virginia, a corporation with $69,000,000 of stock, and whose stock is selling on the market at around $145.00 a share, a great, rich corporation that disregards the law of God and man, and which, regardless of the decision of the Supreme Court of the Commonwealth of Virginia, the State that created this corporation, is going along and damaging these plaintiffs with impunity! I say, in order to make this corporation pay a penalty which would be of such magnitude as to deter it from continuing this damage, and damaging future parties, you must exact a penalty of this gigantic corporation, which will make it stop and think!"

And thereupon defendant objected as follows:

"Mr. Kirkpatrick.—If your Honor please, I object to the argument of counsel. Is this a case where exemplary or punitive damages may be allowed?"

Whereupon the court ruled as follows:

"The Court.—Where persons persist in a wrong the jury may take that into consideration in estimating the damages, especially when the fact of the wrong has been judicially determined.

"In a case in which exemplary or punitive damages are properly allowable, evidence of the wealth of the defendant may be introduced, and such evidence is a legitimate subject of proper comment, for what would be punishment to a poor defendant would be no punishment at all to one of wealth and affluence (*Singer Mfg. Co.* v. *Bryant*, 105 Va. 405, 420, 54 S. E. 320), but it is never permissible for counsel to go outside of the record and testify as to matters not given in evidence, nor, in any case, to make use of language

calculated to inflame the minds of the jurors and induce a verdict not founded solely on the evidence adduced before them. So in this case, even if it were a proper case for punitive damages, the remarks of counsel are obnoxious to the rule we have stated.

But we do not think this case is a proper one for the award of exemplary, or punitive damages. It will be observed that the judgment of this court was not certified to the circuit court until February, 1916, and that the second action was brought August 24, 1916. The railroad company is a great public service corporation. Water for the conduct of its business is an absolute necessity. The location of the tank and pumping-station was selected with a view to the conveyance of a proper supply for the purpose. Whether or not an adequate supply could be obtained elsewhere and meet the necessities of the company does not appear from the record, but it is manifest from the quantity of water taken, and from other circumstances, that if a change was necessary the company should have had a reasonable time in which to ascertain where the new supply could be obtained, and to change its pumping-station and tank, upon making just compensation for the water taken. This was a matter that could not be settled at once, and it cannot be said the continued taking of water from Lockett's creek until a new supply could be obtained and made available, or until condemnation proceedings could be had, was a willful defiance of the judgment of the courts. Certainly, the continued taking of the water up to the time that it was agreed that the matter in controversy should be settled in the chancery suit cannot be said to evince malice or wantonness on the part of the railroad company, or an intention to defy the law of the land, or to oppress the Allens. The evidence in the case does not show that the railroad company was actuated by malice, wantonness or oppression, or that there was any fraud on

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its part, or that it was guilty of any gross negligence or recklessness, or that its action in continuing to take the water, after the order of this court had been certified to the circuit court until arrangements were made to settle the controversy, evinced any intention on the part of the railroad company to disregard the rights of the Allens, or to defy the law of the land. Unless one or the other of these situations existed, the Allens had no right to recover punitive damages. 12 Am. & Eng. Enc. of Law (2nd edition), 21, and cases cited. We do not think, therefore, that the Allens were entitled to recover punitive damages in this case (1) because the law and the facts do not warrant it, and (2) because it was not within the issues submitted to the jury.

This court has more than once reprobated in no uncertain terms the practice of injecting into arguments of counsel statements calculated to inflame the minds of jurors, and tending to produce verdicts as a result of prejudice rather than a calm consideration of the evidence. Every litigant, natural or artificial, is entitled to a fair and impartial trial, and there should be excluded from the tribunal which is to try the case, whether judge or jury, every thing that has no tendency to aid such tribunal in doing impartial justice between the litigants. There can be no difference of opinion on this subject. But, while assenting to this statement of the law, it is argued that the error of addressing improper remarks to the jury was harmless error, as there was ample evidence to sustain the verdict, and it does not appear that the jury found any punitive damages. The harm consisted in depriving the defendant of a fair and impartial tribunal to weigh and consider the evidence lawfully before it touching the actual damages sustained. There was no exact measure of damages in the instant case. The actual damages sustained and to be sustained could not be measured by any exact standard. They were matters which

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largely in the opinions of witnesses, and these opinions were based upon different data. There was a wide difference between the testimony on behalf of the plaintiffs and that on behalf of defendant. And even as to the plaintiffs' testimony based upon the value of horse power in estimating future damages, the value of such horse power is dependent upon the extent that it can be and is utilized. Horse-power without use is valueless. To the extent that the plaintiffs could not, from any cause, obtain grain to grind, or did not obtain it, the horse-power would be valueless unless it could be sold. Upon these questions there was sharp conflict of testimony, and the testimony of one of the plaintiffs was not altogether consistent with his testimony on the former trial, nor was the value of such horse-power ascertained by any satisfactory evidence, and yet upon this issue the verdict was for the exact amount claimed by the plaintiffs. It cannot, therefore, be said that the error was harmless, even though the verdict awarded no punitive damages. On account of the improper remarks by counsel for the plaintiffs in addressing the jury, the verdict will be set aside.

The other objections raised need not be considered, as the questions raised thereby are not likely to arise on another trial.

Reversed.

Sims, J., dissenting.

I differ in the majority opinion in its positions on the following points, namely: As to its being immaterial before which branch of the court the motion to set aside the verdict and award a new trial was made, since the same judge presided over both; as to how the evidence must be regarded by us on the motion to set aside the verdict of the jury on the issue of chancery, as to there being no

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duty upon the appellees to minimize damages, as to the impropriety of counsel in any case going outside of the record and making use of language calculated to inflame the minds of the jurors and induce a verdict not founded solely on the evidence adduced before them. But—

I cannot concur in the majority opinion in taking the following positions, namely: (1) that the permission of the trial court of the remarks of counsel in the case before us was reversible error; or (2) that this was not a case in which it was proper for the jury to take into consideration the allowance of exemplary damages; or (3) that the measure of damages for the future injury to appellees was the difference between the market value of the mill property before and after the injury; or (4) that the verdict of the jury awarding the future damages it assessed was without evidence to support it; and hence I am forced to dissent from the conclusion reached by such opinion in its reversal of the case. The reasons which constrain me to take a different view from the majority of the court upon the four subjects mentioned will be stated in their order below.

(1) I do not think that the remarks of counsel set out in the majority opinion constituted reversible error in this case because of the following considerations:

(a) Such remarks, going outside of the record, were improper and subject to objection in the trial court. But when such objection was interposed, it should, as in the case of other objections to matters of procedure or the conduct of the trial, have stated the ground of the objection. In the instant case, as will be noted, the ground of objection stated before the trial court was not that the appeal to the jury was "inflammatory," or "unjust," or "deserving of stern rebuke," (the objection made before us on appeal), nor any objection to that effect. The only objection made was that it was not a case where exemplary or puni-

tive damages might be allowed. The trial judge naturally passed and ruled only upon the objection made. The further objection aforesaid was not made at all, not even in the motion to set aside the verdict and grant a new trial, nor was it passed upon by the trial judge, but is urged before us for the first time.

This subject is governed by the same rule of procedure which is applicable to other errors of procedure which may be committed in the trial of a case. "Such a line of argument" may be the subject of review on appeal "if proper objection be made to it at the proper time and the trial court fails to take proper steps to correct its ill tendencies. * * *" *Southern Ry. Co.* v. *Simmons*, 105 Va. 651, 666-7, 55 S. E. 459, 464. But if the objection made in the appellate court was not made in the trial court, and the trial court was not asked to rule on or instruct the jury upon such objection, the objection cannot be considered on appeal. *State* v. *Clifford*, 58 W. Va. 681, 52 S. E. 864; *Landers* v. *Ohio River R. Co.*, 46 W. Va. 492, 33 S. E. 296. And the same principle upon which rests the rule that where a specific objection to the admission of evidence is properly overruled by the trial court, other objections cannot be thereafter assigned as error on appeal (*Richmond Ice Co.* v. *Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650; *Warren* v. *Warren*, 93 Va. 73, 24 S. E. 913), applies to the objection in question in the cause before us. It seems to me, therefore, that for this reason such objection cannot be considered by us. Further:

(b) According to the salutary rule of this court, now firmly established, it must affirmatively appear from the record that an error has been prejudicial to an appellant, otherwise the error must be considered by this court as having been harmless and is not ground for reversal. *Standard Paint Co.* v. *Vietor & Co.*, 120 Va. 595, 91 S. E. 752.

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On this subject, the trial judge and chancellor, in his opinion made a part of the record, says: "Allusion has been made to the fact that the jury may have included punitive or exemplary damages in their verdict. I think the size of their verdict makes it manifest that they did not do this, although I think that they might have considered doing this, as the court informed them that a persistent trespasser upon the rights of another, particularly after those rights have been judicially determined, does not stand upon the footing of an ordinary trespasser. I think it is apparent from the evidence that the jury put into that verdict nothing except what they thought was necessary to compensate the plaintiffs for the actual injuries which they have sustained or may sustain in their business and property both in the past and for the future, and speaking now as chancellor and not as a law judge, I say that they have not given them one dime more than I would have done after hearing the evidence, had I determined the matter without a jury."

The verdict of the jury was merely advisory of the chancellor. The decree, after all, is what must be looked to in order to ascertain whether exemplary damages or *excessive damages* have been awarded; and the chancellor has certified that the decree did not award any such damages but only proper compensatory damages.

Further, on the question of whether the damages assessed by the verdict of the jury and decreed by the chancellor were excessive: As I view the evidence, as hereinafter stated, there was ample evidence to support the verdict and decree for the amounts of damages allowed as purely compensatory damages.

Hence, it seems clear that not only does it not affirmatively appear that the decree complained of included exemplary or excessive damages, but the contrary appears from the record. Therefore, if there was error in the permission of the remarks of counsel, it was harmless error.

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(2) As to the position aforesaid that this case was not one where the allowance of exemplary or punitive damages might have been considered by the jury:

Appellant does not question that if the cause before us had been an action at law, exemplary or punitive damages might have been recovered under the rule laid down in 2 Blackstone's Com. 220, as follows: "Indeed, every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardihood to continue it."

And this is true of all repeated trespasses and repeated torts. 8 R. C. L., section 133, page 588. The existence of actual malice or ill will on the part of the defendant is not necessary to warrant the allowance of exemplary damages against him. The existence of "malice in law" is sufficient, and exemplary damages may in the discretion of the jury be assessed in all cases of trespass and torts where the conduct of the defendant is "a wrongful act, done intentionally, without legal justification or excuse." Note to 16 L. R. A. (N. S.) 440. As said in 8 R. C. L., *supra*: "Willfully to commit a trespass upon the rights of an individual is of itself sufficient to permit the awarding of punitive damages, though committed on but one single occasion; and especially may such damages be allowed when the trespass is repeated. Thus, where a recovery has once been had for a nuisance, and it is continued, exemplary damages are allowed as a matter of course upon a second successful suit * * *."

Hence, I must say, with great deference, that I think the majority opinion in its discussion of the subject under consideration ignores the well settled rule above adverted to, that actual malice in fact need not exist in order to warrant a jury in considering the allowance of exemplary or punitive damages. If malice in law exists (which was true of

the instant case, as above pointed out, and as indeed follows from the statement in the majority opinion that the defendant was no less a trespasser because it intended to exercise its right of eminent domain. Since, that being so, it was a repeated trespasser, it was sufficient to bring the case within the operation of the rule that the jury might have considered the allowance of such damages.

And appellant does not, in the able argument of learned counsel in the petition or brief, or orally before us, controvert the correctness of the above conclusion, except upon one ground, namely, it contends that the awarding of exemplary or punitive damages is not a function of a court of equity. The case of *Kerns* v. *Allen*, 115 Va. 548, 115 S. E. 357, 16 Ann. Cas. 543, is the only authority cited and relied on in support of the position that such a court will not award such damages, but only compensatory damages. In that case the plaintiffs, by their bill, sought the aid of a court of equity, not only to abate a nuisance, but also to recover the damages sustained by reason thereof. That case denied the recovery of exemplary damages in equity on the ground (to quote from the opinion therein) that, "* * * where one comes into a court of equity he waives his claim for punitive damages * * * the plaintiffs had their election to sue at law or in equity. They elected to sue in equity, and having done so, they brought themselves within the rules of equitable actions and waived the right to recover exemplary damages." The authorities referred to in that case, which sustain its said holding, place the distinction between the right of recovery of exemplary damages at law and in equity on the same ground, and the recovery of such damages is denied in a court of equity on the ground that the plaintiffs have themselves sought the aid of that court to recover damages. It was not so, however, in the cause before us. In the case before us the appellees elected to sue at law and did sue at law for damages. By their bill

in equity they prayed only for the equitable relief of the abatement of the nuisance caused by the conduct of the appellant. They did not pray that the court of equity should assess any damages ancillary to that relief or otherwise. As appears from the decree of December 4, 1916, hereinafter quoted from, the relief sought by appellees in equity was only that the court would "award the injunction as prayed for in the bill," and it was "upon the defendant's (appellant's) motion that the court enjoin and restrain the plaintiffs' (appellees') action at law now pending in this court to recover damages * * *" that the court below refused the injunction prayed for by the appellees and took jurisdiction on its chancery side "to do complete justice to the plaintiffs herein and to avoid a multiplicity of suits * * *" In the cause before us, therefore, the plaintiffs in the court below (the appellees here), were, on motion of the defendant there (the appellant here), denied the exercise of their election to sue at law for their damages and were forced against their will to have the same assessed in a court of equity. In such a case it would be inequitable to deny to the appellees the benefit of the rule aforesaid which would have been applicable in their action at law (and in the repeated actions they might have thereafter brought), and hence I think that the objection made by appellant that this is not a case in which exemplary or punitive damages might have been allowed by the jury was not well taken.

The majority opinion on the subject under consideration rests, essentially, upon its view that the case before us must be considered as if it were a proceeding to condemn the water rights in question. It assumes that procedure in the court below by which it took jurisdiction to award future as well as past damages to the appellees, was an *arrangement* made to settle the controversy between the parties in lieu of condemnation proceedings, and, in effect,

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that such arrangement was accepted and assented to by the appellees. With the utmost deference, I must say that I can find nothing in the record to bear out such an assumption.

The record in the case shows that on December 4, 1916, the following order or decree was entered in the court below:

"This cause came on this day to be again heard on the papers formerly read, to-wit, bill and depositions in support thereof, the answer thereto, the affidavit of A. Bruner in support of said answer, and on the plaintiffs' motion to award the injunction as prayed for in the bill, and upon the defendant's motion that the court enjoin and restrain the plaintiff's action at law now pending in this court to recover damages of the defendant for the injuries caused the plaintiff by the diversion, by the defendant, of the water of Falling creek and its tributaries from July 3, 1912; and the court having heard the argument of counsel on October 10, 1916, when this matter was first presented to it and not then being advised of its judgment, did take time to consider thereof and adjourned the further hearing thereof until the first day of November, 1916, term, and upon the day last mentioned, the court doth adjudge, order and decree as follows:

"That the injunction prayed for by the plaintiffs be and the same is hereby refused, because the defendant is shown to be a common carrier, and the inconvenience to it in granting said injunction would far outweigh the benefit to the plaintiffs in awarding the same, also because since the trial of the common law cause in this court between the above parties, it is shown that the defendant has built a new line which diverted a large part of its traffic around the water tank in question, and it is not shown what damage, if any, is done to the plaintiffs under these conditions, and further, because this court, on its chancery side, hav-

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ing complete jurisdiction of the parties and the subject matter, may do complete justice to the plaintiffs herein and avoid a multiplicity of suits, and, therefore, the court doth decide to assume such jurisdiction on its chancery side, and to the end that it may be further advised as to its judgment, doth order that a jury be empaneled at the bar of this court, which jury is directed to report unto this court for its consideration the findings of said jury upon the following issues, to-wit:

"First: What sum of money, if any, the plaintiffs should recover as damages for the diversion of the water by the defendant from Lockett's creek from the third day of July, 1912, to the date of the trial of this issue; and

"Second: What damages, if any, will the plaintiffs sustain in future by the continued diversion of water by the defendant from said stream.

"And the court doth further adjudge, order and decree that the plaintiffs be restrained from the further prosecution of their action for damages against the defendant on the common law side of this court, pending the proceedings above directed upon the chancery side of this court."

Thereafter, the decree complained of was entered on December 8, 1916, allowing the appellee the damages set forth in the majority opinion, and perpetually enjoined and restrained the appellees from suing the appellant at law for future damages in the premises.

It is true that counsel for appellant states, both in his brief and in oral argument, that the appellant intended to institute condemnation proceedings, and counsel for appellees did not deny that statement. But appellant did not, as a matter of fact, institute condemnation proceedings. Nor does it appear that the court below took jurisdiction to award damages past and future in lieu of condemnation proceedings, nor that appellees by counsel or otherwise assented to its taking such jurisdiction in lieu of condemna-

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tion proceedings. On the contrary it appears from the order or decree of court above quoted that the court below took such jurisdiction in lieu of allowing repeated actions at law and in lieu of awarding the injunction prayed for by appellees.

(3) As to the "market value" measure of damages being applied as the measure of the future damages:

The position of the majority opinion on this point also rests upon the assumption aforesaid, that this practically is a case of a condemnation proceeding by appellant to take the water right aforesaid for public use, under the exercise by it of the power of eminent domain granted to it by legislative authority. But, as aforesaid, this is not such a case. As stated in the majority opinion itself: "The railway company was no less a trespasser because it intended to exercise its right of eminent domain than if it had entertained no such intention. *Norfolk & Ocean View Ry. Co.* v. *Turnpike Co.*, 111 Va. 131 [68 S. E. 346, Ann. Cas. 1912 A, 239]." The same measure of damages should therefore be applied to the injury caused by such trespasser as is applicable to the same character of injury caused by any other trespasser according to the well settled rules of law on the subject.

Now, in the instant case, the damages to which the plaintiffs were entitled were such as they were entitled to recover by succeeding actions for temporary injury or temporary damages. They were forced into a court of equity on the subject of damages by the defendant, and that court exercised its jurisdiction to award to the plaintiffs all the damages which they were entitled to recover at law, so as to afford them full relief in allowance of damages, having enjoined the prosecution by plaintiffs of their pending and the institution by them of any succeeding action at law to recover the damages in question. In such case it seems plain that the measure of damages in the case before us must be the same as they would have been in the pending

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and in succeeding actions at law, which, but for such injunction, the plaintiffs would or could have prosecuted. For the measure of damages in such cases, we must look to the common law rule on the subject.

Now it is the settled rule of the common law that in actions for temporary injury or temporary damages, such as we have under consideration, the measure of damages is the loss sustained by the plaintiff in deprivation of the use or usable value of the property, and the "market value" rule of measure of damages is not applicable. 8 R. C. L., section 51, 53, 67, 68; 2 Farnham on Waters, section 510; *Norfolk County Water Co.* v. *Etheridge*, 120 Va. 379, at page 382, 91 S. E. 133; *McHenry* v. *City of Parkersburg*, 66 W. Va. 533, 535, 66 S. E. 750, 29 L. R. A. (N. S.) 860. Loss of net profits is a proper element for consideration in applying such measure of damages. 8 R. C. L., section 67 68; 2 Farnham on Waters, section 510. Lost profits or lost gains are as recoverable as any other loss, if proved with reasonable certainty. *Burruss* v. *Hines*, 94 Va. 413, 26 S. E. 875. The result of the injury complained of in the instant case was to deprive the plaintiffs in error of the use of water to drive their mill to the extent of a certain amount of horse-power.

Therefore, the market value of such horse-power, or the expense of replacing it, was proper evidence for consideration in applying the measure of damages aforesaid. *Waston* v. *Boston Railroad*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825. "The law adopts that mode of estimating damages which is most definite and certain" in the particular case. *Griffin* v. *Colon*, 16 N. Y. 489, 69 Am. Dec. 718. And as to future damages the value of the horse-power lost was more definite and certain than an estimate of future loss of profits.

Of the cases cited in the majority opinion on the point under consideration, those of *Hunter* v. *C. & O. Ry. Co.*;

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Burger v. *State Female Normal School;* and *Richmond, etc., R. Co.* v. *Chamblin,* were cases involving condemnation proceedings actually instituted; that of *Richmond, etc., R. Co.* v. *Humphreys* was an action for permanent damages; that of *Norfolk County Water Co.* v. *Etheridge,* in so far as it applied the "market value" measure of damages, was an action for permanent damages; that of *Virginia R. Co.* v. *Hurt* did not involve or pass on the question under consideration; and that of *McHenry* v. *City of Parkersburg is directly against* the holding of the majority opinion now being considered, in that it expressly holds, at page 535 of 66 W. Va., at page 751 of 66 S. E. (29 L. R. A. [N. S.] 860): "Injury to real estate differs in nature and degree. * * * The injured party is limited to the recovery of temporary damages, when the injury is intermittent and occasional * * *," as is true in the instant case, as pointed out in the majority opinion; and in that case the court below was reversed for applying the "market value" measure of damages to a case of intermittent or occasional injury such as is the nature of the injury in the case before us.

As to the text-writers cited in the majority opinion, and other text-writers on this subject, they sanction the application of the "market value" measure of damages to cases of permanent injury to real estate only, or where the damages are assessed in a condemnation proceeding, or in cases in which the plaintiff's right of action does not exist at common law, but is dependent upon a constitutional guarantee against his property being taken for public use without "just compensation;" in which latter cases the measure of damages is governed by the constitutional and statutory provisions of the particular jurisdiction on the subject. See 2 Lewis on Em. Dom., sections 687, 689, 696, 752, 890, 891; *Tidewater R. Co.* v. *Shartzer,* 107 Va. 562, 567-8, 59 S. E. 407, 17 L. R. A. (N. S.) 1053.

(4) As to the verdict of the jury for future damages being without evidence to support it:

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As this is a minority opinion, it would serve no useful purpose for it to enter upon any discussion of this pure question of fact, since no difference with the majority opinion on any legal question is involved therein. It is deemed sufficient to say here that, as I view the record, it contains ample evidence to support the verdict and decree for the future damages allowed, the weight and credibility of which was for the consideration of the jury so far as their verdict was concerned. *Barbour* v. *Melendy & Russell,* cited in the majority opinion; and see also, *Carter* v. *Campbell,* Gilmer (21 Va.) 159; *Almond* v. *Wilson,* 75 Va. 613, 626; *Fishburne* v. *Ferguson's Heirs,* 84 Va. 87, 102, 4 S. E. 575; *Muse* v. *Stern,* 82 Va. 33, 35, 3 Am. St. Rep. 77; *Mears* v. *Dexter,* 86 Va. 828, 832-3, 11 S. E. 538.

For the reasons stated above, I am constrained to dissent from the majority opinion.

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Richmond.

NORFOLK SOUTHERN RAILROAD COMPANY v. THE GREENWICH CORPORATION AND OTHERS.

March 21, 1918.

1. AMENDMENTS—*Substitution of New Party.*—An entirely new plaintiff cannot be substituted after it has become manifest that the original plaintiff could not maintain the action, the proper practice in such a case would have been for the plaintiff to ask to be allowed to suffer a non-suit before the jury retired, under section 3387 of the Code of 1904, and to have renewed the suit in the name of the proper plaintiff.
2. AMENDMENTS—*New Cause of Action—Misjoinder of Parties.*—At common law the courts had no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action.
3. AMENDMENTS—*Substitution of New Party—Sections 3259, 3260, of the Code of 1904, and Acts 1914, page 641—Corporation a Separate Entity from its Stockholders.*—Sections 3259, 3260, of the Code of 1904, and Acts 1914, page 641, plainly do not contemplate the substitution of entirely new plaintiffs, but are rather intended to apply to amendments involving amplified and supplemental statements of the original action, and in furtherance of its object. They were never intended to permit the substitution of a new cause of action. The circumstance that in the case at bar the substituted plaintiffs owned the stock of the original plaintiff, a corporation, did not affect the question. The corporation was a separate entity from its stockholders, with power to sue and be sued; and, certainly in a legal forum, they stood in the same relation to each other as any other litigants.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of assumpsit. Judgment for plaintiffs. Defendant assigns error.

Reversed.

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The opinion states the case.

Jas. G. Martin, for the plaintiff in error.

Terry and *Strode,* for the defendants in error.

WHITTLE, P., delivered the opinion of the court.

We shall for convenience designate the original parties as they were in the circuit court, the plaintiff in error as defendant and the Greenwich Corporation as plaintiff.

The action was *assumpsit*, brought by the plaintiff against defendant to recover damages alleged to have been caused by delay in transit by defendant, or connecting carriers designated and selected by it, of a carload of spinach shipped from Greenwich station, Princess Anne county, Virginia, to the city of Boston, Massachusetts. The controlling question for determination is raised by the first assignment of error, and the view that we take of it renders it unnecessary to notice other assignments.

Some of the principal facts bearing upon the case appear from the following order entered by the circuit court during the progress of the trial: "This day came again the parties by their attorneys, and thereupon came a jury, to-wit: * * * who were sworn to well and truly try the issue joined, and thereupon the evidence being partly heard, the plaintiff asked leave of the court to amend its declaration by making J. R. Simpson and C. C. Hudgins, individually and as partners trading as Simpson & Hudgins, parties plaintiff * * *; and leave being given, the plaintiff's declaration is accordingly amended * * *; and thereupon the jury having further and fully heard the evidence * * * found a verdict in these words: 'We the jury find for the plaintiffs, Simpson & Hudgins, in the sum of $305.87 with interest at six per cent. per annum from

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March 28, 1913, due to negligence on the part of the New York, New Haven and Hartford R. R.'"

Whereupon, defendant moved the court to set aside the verdict as contrary to the law and the evidence, and also to enter a judgment for the defendant *non obstante veredicto;* but the court overruled both motions and rendered judgment against the defendant for Simpson & Hudgins in accordance with the verdict. It further appeared from the evidence that Simpson & Hudgins owned practically all the stock of the Greenwich Corporation; and that the bill of lading was issued to them as consignors of the carload of spinach.

The action was brought against defendant as initial carrier under the Carmack amendment, which allows such action to the "lawful holder" of the bill of lading; and plaintiff not being the "lawful holder" of the bill of lading, of course, could not maintain the action. In these circumstances, the correct practice would have been for plaintiff to ask to be allowed to suffer a non-suit before the jury retired, under section 3387 of the Code; and to have renewed the suit in the name of the proper plaintiff. It will be observed that the ruling of the court, which is the ground of exception, did not involve the insertion of an *omitted* party or the *dropping* of a supernumerary, but the *substitution* of an entirely new plaintiff, after it had become manifest that the original plaintiff could not maintain the action. When the amendment was allowed there was a clear misjoinder; and this was shown by the verdict of the jury which the court approved. If the original plaintiff had been *dropped* by direct order of the court when the new plaintiff was admitted, then unquestionably an entirely *new case* would have been made by the amendment. Yet precisely the same result was attained by indirection through the medium of the verdict and judgment which ignored the original plaintiff. This departure from correct practice

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involves this obvious incongruity: the jury which was sworn to try the issue joined between the Greenwich Corporation and the Norfolk Southern Railroad Company, rendered their verdict in favor of Simpson & Hudgins against defendant, between whom no issue had been joined which the jury was sworn to try. In the nature of things, a rule productive of such a result cannot be sound; if so, pleading would be a "delusion and a snare"—the means of perverting justice rather than promoting it.

Code procedure has not been adopted in this State; and "At common law the courts had no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action." 31 Cyc. 409. The same principle is thus stated by Burks in his work on Pleading and Practice: "Of course, a party is never permitted to make an entirely new case by his amendments." Burks' Pl. & Pr., 586. See, also, for a discussion of the subject of misjoinder and non-joinder of parties, Burks' Pl. & Pr., pp. 74, 75, 76, and section 312. It is also stated in the volume of Cyc. above cited, that even under the codes and practice acts, that "In a majority of the States the courts have established the doctrine that the powers conferred upon them, under their codes and practice acts, in respect to amendments which set up a new and distinct cause of action, are no greater than that existing at common law, and that they are not authorized to grant such amendments at any stage of the proceedings." 31 Cyc. 409, 410. See, also, p. 470, where it is said: "In some jurisdictions the only limitations upon the right to amend in an action at law is that there cannot be an entire change of parties plaintiff or defendant."

Our statutes, sections 3259, 3260, of the Code, and Acts 1914, p. 641, invoked to affirm the judgment, plainly do not contemplate the substitution of entirely new plaintiffs, but are rather intended to apply to amendments involving amplified and supplemental statements of the original action,

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and in furtherance of its object. They were never intended to permit the substitution of a new cause of action. The circumstances that in this instance the substituted plaintiffs owned the stock of the Greenwich Corporation does not affect the question. The corporation was a separate entity from its stockholders, with power to sue and be sued; and, certainly in a legal forum, they stood in the same relation to each other as any other litigants.

For these reasons, the judgment must be reversed and the case remanded for further proceedings.

Reversed.

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Richmond.

SAMUEL AND OTHERS v. HUNTER'S EXECUTRIX.

March 21, 1918.

1. APPEAL AND ERROR—*Admissibility of Evidence.*—Upon the trial of a cause involving the genuineness of a will, the contestants of the will offered a witness to prove certain declarations of the testatrix made subsequent to the date of the alleged will, accompanying the offer with an avowal by counsel that he expected to show by the witness that from the declarations of the testatrix, that the testatrix "could not have known of this will." The record did not show what the alleged declarations of the testatrix were, therefore the Supreme Court of Appeals must assume from the avowal that they were such as would have tended to show that the testatrix could not have known of the will.
2. WILLS—*Genuineness—Declarations of Testatrix.*—In a contest over the genuineness of a will, the declarations of the testatrix, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will; but in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as circumstances, either to strengthen or to weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will.

Error to a judgment of the Circuit Court of the city of Norfolk upon an issue of *devisavit vel non.* Judgment for executrix, the proponent of the will. The contestants assign error.

Reversed.

The opinion states the case.

R. R. Hicks, for the plaintiffs in error.

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N. T. Green and *Thomas H. Willcox, Sr.*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

A writing purporting to be the will of Newtie E. Hunter, an elderly maiden lady, who resided in Norfolk and died there in 1914, was admitted to probate by the clerk of the circuit court of that city. Rosa S. Samuel and others, claiming to be the heirs at law of the alleged testatrix, appealed to the circuit court from the clerk's order of probate. Upon an issue *devisavit vel non* made up and tried in that court, there was a verdict and judgment in favor of the proponent, Mrs. Lydia A. Howe, the executrix and chief beneficiary under the will. Thereupon the contestants brought the case here for review.

The will was attacked upon the sole ground that it was not genuine, but had been forged through the procurement of Mrs. Howe. Miss Hunter's testamentary capacity was unquestioned, and it was not claimed that any undue influence had been exercised over her. At the trial the contestants offered a witness to prove certain statements of the testatrix made subsequent to the date of the alleged will, accompanying the offer with the following avowal by counsel:

"I expect to show by this witness, she, two weeks prior to her death, stated that she was going to leave her property to her heirs, or those who were near to her, and that she at that time, from the character of the language she used, could not have known of this will. Everything she said was contrary to the terms of the will at that time."

The only specific objection made to the testimony thus proffered was that it did "not show undue influence." That question was not involved. The record in the case and the oral and printed arguments of counsel in this court clearly

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indicate that the trial court rejected this evidence on the ground that it could not be received for any purpose in a case involving merely the genuineness of the will. This ruling is assigned as error.

The record does not show what the alleged declarations of the testatrix were, and we must assume from the avowal that they were such as would have tended to show that she "could not have known of this will." The contention of counsel for plaintiffs in error is that, in a contest over the genuineness of a will, where there is independent evidence (as there is in this case) tending to show that the writing is a forgery, the declarations of the alleged testatrix, showing knowledge or lack of knowledge of the existence of such a will, are material as circumstances for the consideration of the jury.

The question thus presented does not seem to have been judicially determined in this State, but has been frequently passed upon in other jurisdictions. The authorities are not in accord upon the subject, but we are of opinion that the rule supported by the better reason and authority is that such declarations, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will; but that in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as circumstances, either to strengthen or to weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will. This is the settled rule in England, and it is well supported by authority in this country. *Doe* v. *Palmer*, 16 Q. B. 747, 15 Jur. 836; 1 Wigmore on Ev., sec. 112; 3 Wigmore on Ev., sec. 1735; *State* v. *Ready*, 78 N. J. L. 599, 75 Atl. 564, 28 L. R. A. (N. S.) 240; *Hoppe* v. *Byers*, 60 Md. 381; *Johnson* v. *Brown*, 51 Tex. 65; *Swope* v. *Donnelly*, 190 Pa. 417, 42 Atl. 882; 70 Am. St. Rep. 637; Freeman's note, 107 Am. St. Rep. 460, 461-2.

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We shall not review at length the authorities which we have cited. A satisfactory summary of the result of our investigation of this question is well expressed in the following quotation from *Swope* v. *Donnelly, supra:* "In all these cases it was said, in effect, that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration. In the opinion in *Hoppe* v. *Byers,* 60 Md. 381, it was said: 'But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been preceded by direct proof of witnesses to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence has been first given, proper for the consideration of the jury.' At the best, this is a dangerous class of testimony, and its admission should be carefully guarded, and its effect as corroborative only should be clearly defined."

In the instant case, it is true, the alleged declarations were offered in evidence in advance of the other proof tending to show forgery, but counsel for the proponent made no point of this, either in the court below or in this court. The mere order of proof is not usually material, and was not so in this case.

The leading case against the admissibility of evidence of the kind here in question, and the case chiefly relied upon by defendant in error, is *Throckmorton* v. *Holt,* 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. The majority opinion in that case was prepared by Mr. Justice Peckham, and evinces much consideration and research. The value of the opinion, however, as a precedent is impaired, not only by what we think the unsatisfactory reasoning upon which

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it is based, but by the fact that Mr. Justice (now Chief Justice) White, Mr. Justice Harlan and Mr. Justice McKenna dissented upon the point now before us, and Mr. Justice Brown concurred only in the result. Furthermore, the decision has been seriously criticised and questioned by very high authority. In *State* v. *Ready, supra,* Gummere, Chief Justice of the Court of Errors and Apepals of New Jersey, delivering the opinion, reviewed the cases cited by Mr. Justice Peckham and reached the conclusion that they do not support the principal case.

A note to section 1735 of Vol. 3 Wigmore on Evidence, refers to the opinion in *Throckmorton* v. *Holt* as "making the surprising statement that the 'weight of authority' is against the admissibility of the evidence in question;" and again, in the same work, Vol. 5, in a note to section 112 the following comment appears: "The only case ever intimating the contrary seems to be *Throckmorton* v. *Holt,* U. S., cited *post,* section 1734, n. 2. In *State* v. *Ready, supra,* the learned chief justice's statement that on this rule 'judicial sentiment is altogether out of harmony' and 'courts are divided,' is comprehensible only as an expression of delicate consideration for the Federal Supreme Court's lonesome decision of *Throckmorton* v. *Holt;* for the fact seems to be that *Throckmorton* v. *Holt* is the *only* case ever decided to the contrary; and the present opinion itself points out the inadequacy of the citation in *Throckmorton* v. *Holt* to sustain its decision."

Counsel for the proponent cite the case of *Wallen* v. *Wallen,* 107 Va. 131, 57 S. E. 596, to show that this court has approved the rule as announced in *Throckmorton* v. *Holt;* but no such effect can be ascribed to the former case. In *Wallen* v. *Wallen,* Judge Keith said: "The principle established seems to be that the declarations of the testator are admissible to show his mental condition or capacity, as well as his feelings and affection, but are inadmissible as proof

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of the substantive fact of undue influence;" and cites *Throckmorton* v. *Holt* to sustain his statement of the law. There is no conflict between the conclusion reached by Judge Keith in *Wallen* v. *Wallen* and that which we have arrived at in the present case; indeed, the rule that declarations of a testator are not admissible to prove the substantive fact of undue influence, but are admissible to show the testator's mental condition, is entirely in harmony with the rule herein approved, that such declarations are not admissible to prove the substantive fact of forgery, but are admissible as showing the state of mind of the testator and his plan and intent as being consistent or inconsistent with a will, the genuineness of which is called in question by other proper evidence.

In our opinion it was error to exclude the testimony offered on behalf of the contestants.

We have carefully considered all the other assignments of error in the case, and are of opinion that they afford no ground for reversal, and require no further discussion.

For the error in excluding evidence, as pointed out above, the judgment must be reversed and the cause remanded for a new trial.

Reversed.

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Richmond.

STEWART V. STEWART.

March 21, 1918.

1. DEEDS—*Deed Made after Death of Grantee.*—A deed made to a grantee after his death is ineffectual to pass title and void.
2. PARTITION—*Jurisdiction—Equitable Estate.*—Under the provisions of section 2565 of the Code of 1904, a court of equity has jurisdiction to partition equitable estates in land. So where a decedent was the complete equitable owner of a lot at the time of his death, equity may decree that the lot be sold for partition among his heirs at law, upon a bill filed by some of the heirs against the remaining heirs for partition.
3. APPEAL AND ERROR—*Amendments—Prejudice.*—Where in point of fact a case was disposed of on issues raised on the original bill and answer, no notice being taken of the amended bill in the decree, defendants were not prejudiced by the action of the court in permitting the amended bill to be filed, and in not dismissing it on demurrer and answer.

Appeal from a decree of the Circuit Court of Madison county. Decree for complainants. Defendants appeal.

Affirmed.

The opinion states the case.

Will A. Cook, for the appellants.

N. G. Payne and *John S. Chapman,* for the appellees.

WHITTLE, P., delivered the opinion of the court.

Plaintiffs below (grandchildren and heirs at law of Washington Stewart, deceased) filed their bill against the

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remaining heirs for partition of a lot containing two acres of land, whereof decedent was alleged to have died seized and possessed.

Appellant, D. Y. Stewart, answered, denying that his grandfather, Washington Stewart, owned the lot; and asserting title thereto in respondent's father, Clark Stewart, upon whose death he averred the ownership devolved upon his widow and heirs. Respondent further alleged that for many years the possession of the lot had been held by Clark Stewart's family, who paid the taxes thereon.

The circuit court referred the cause to a special commissioner in chancery, with directions that he report, among other matters, who were the owners of the lot in controversy, and whether or not it was susceptible of partition in kind. The commissioner reported that Washington Stewart became the purchaser of the lot in the chancery causes, heard together, of *Hutchinson* v. *Sibert* and *Wayland* v. *Scott;* that Washington Stewart died in the year 1880; and that eleven years after his death a commissioner acting under a decree in the above named causes executed and acknowledged a deed to the two-acre lot, in which deed Washington Stewart was named as grantee. In these circumstances, the commissioner reported that though the deed was ineffectual to convey title to the lot to the grantee and was void, nevertheless, that at the time of his death Washington Stewart was the equitable owner of the lot; and that the same was not susceptible of partition in kind among his heirs. The commissioner, upon conflicting evidence, rejected the claim of appellant, D. Y. Stewart, that his father owned the lot at the time of his death.

The defendants excepted to the findings of the commissioner, but the court overruled the exceptions and confirmed the report, and decreed that the lot be sold for partition among the heirs at law of Washington Stewart. From that decree this appeal was allowed.

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Of the correctness of the commissioner's finding and the court's decree sustaining it, we have no doubt. The records in the two chancery causes referred to show that Washington Stewart purchased the lot under a decree therein; and the contention that it was bought for his son, Clark Stewart, and with his means, thereby creating a resulting trust in the lot in his favor, was not established by the evidence. It is true, as the commissioner held, that the deed made to Washington Stewart after his death was ineffectual to pass title and void. 2 Minor on Real Property, section 1088. Still he was the complete equitable owner of the lot at the time of his death; and under the liberal provisions of section 2565 of the Code, a court of equity has jurisdiction to partition equitable estates in land. *Hagan* v. *Taylor*, 110 Va. 9, 65 S. E. 487.

Complaint is made of the action of the circuit court in permitting an amended bill to be filed; and also in not dismissing it on demurrer and answer. In point of fact, the case was disposed of on issues raised on the original bill and answer. No notice seems to have been taken of the amended bill and pleadings in any of the decrees, and it is not perceived that appellants were prejudiced by its physical presence in the record.

Upon the whole case, we find no error in the decree appealed from, and it must be affirmed.

Affirmed.

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Richmond.

TURNBULL V. COUNTY OF BRUNSWICK.

March 21, 1918.

1. TAXATION—*Excessive Rate—Remedy.*—If a local tax, legal and regular in other respects and designated for a single purpose, is levied in excess of the authorized rate, the tax is not thereby rendered invalid as to the whole amount, but only as to the excess.

2. TAXATION—*Excessive Rate—Remedy—Case at Bar.*—The board of supervisors of a county levied a district road tax of forty cents on the one hundred dollars and a county road tax of fifteen cents on the one hundred dollars value of real and personal property situate in a certain magisterial district of the county. The Code of 1904, section 944-a, sub-section 12, provides that before a road tax exceeding a total of fifty cents on the one hundred dollars worth of property shall be levied, the question of such tax shall be submitted to the people of the county or district affected. In the instant case, the question was not submitted to the people, but as the entire tax was to be applied to county and district road purposes, there was no difficulty in separating the illegal excess from the authorized tax, and therefore a judgment of the circuit court of the county exonerating plaintiffs from the excess was not erroneous.

3. TAXATION—*Illegal Taxes—Remedy.*—Section 571 of the Code of 1904 provides a satisfactory and adequate remedy for the individual taxpayer, and section 841 of the Code provides an ample remedy in all cases in which the citizens of the entire county or of any district feel themselves aggrieved by an alleged illegal tax.

Error to a judgment of the Circuit Court of Brunswick county, on a motion to correct an erroneous assessment. Judgment for the county. Plaintiffs appeal.

Affirmed.

The opinion states the case.

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B. A. Lewis, N. Turnbull and *E. R. Turnbull, Jr.*, for the plaintiffs in error.

Marvin Smithey, for the defendant in error.

KELLY, J., delivered the opinion of the court.

Sub-section 11 of section 944-a of the Code directs that the board of supervisors of each county shall annually levy a county road tax on all real and personal property subject to local taxation at a rate not to exceed forty cents on the one hundred dollars in value of such property, and sub-section 12 directs a district road tax at a like maximum rate, but adds in the latter sub-section the limitation, "that when the board of supervisors decide to levy a tax under this and the preceding section exceeding a total of fifty cents on the one hundred dollars worth of property, then before such tax shall be levied the question of such tax shall be submitted to the people of the county or district affected as to whether said tax shall be levied."

The following agreement of facts is made a part of the record in the instant case: "It is agreed that the board of supervisors of Brunswick county, for the year 1916, did levy a district road tax of forty cents on the one hundred dollars and a county road tax of fifteen cents on the one hundred dollars value of real and personal property situate in Red Oak magisterial district, Brunswick county, Virginia, and the same was not submitted to the vote of the people. It is further agreed that Edward R. Turnbull, Jr., and J. W. Upchurch are the fee simple owners of a tract of land situate in said district, containing fourteen hundred and eighty (1480) acres and assessed at the sum of eight thousand one hundred dollars ($8,100.00). It is further agreed that the said tract of land is assessed with a district road tax amounting to the sum of thirty-two dollars ($32.40)

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and forty cents, and with a county road tax for the sum of twelve dollars ($12.15) and fifteen cents for the year 1916."

Turnbull and Upchurch applied to the circuit court of the county for an order exonerating them from the payment of the whole amount of the county and district road tax, but that court was of opinion that the applicants could only be relieved as to the excess over the fifty cent rate authorized by the statute without a popular vote, and accordingly ordered "that they be exonerated from the payment of $4.05, the excess five cents on the said $100.00 value of said property, the said sum of $4.05 to be deducted proportionately from the $32.40 county road tax and the $12.15 district road tax."

This action of the circuit court is assigned as error, and the assignment rests upon the contention "that the board having exceeded the authority of the law, the act which governed the right to levy the tax, without submitting the same to the vote of the people as provided by the said act, the whole levy is null and void and there was nothing left for the court to do but to declare the levies illegal."

There is some conflict of authority upon the question thus presented, but we think the sounder view, and the one more in harmony with the general plan and policy of the Virginia statutes germane to the subject, is that if a local tax, legal and regular in other respects and designated for a single purpose, is levied in excess of the authorized rate, the tax is not thereby rendered invalid as to the whole amount, but only as to the excess.

The rule is stated in 27 Am. & Eng. Ency. of Law (2d ed.), at page 612, as follows: "A tax in excess of the prescribed limit is void only as to the excess, provided such excess can be legally separated from the valid portion of the tax; but when the illegality permeates the whole tax, so that such separation cannot be made, the entire tax must fail." See also cases cited in note 5 to above and note 5 to Supplement 4 A & E. Ency. 1036.

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To the same effect is the text in 37 Cyc. 969, where it is said that "where taxes are levied to the prescribed limit, the power is exhausted, and any tax levied in excess thereof is illegal and void." See also cases cited in note 38 to above text.

In the instant case, the entire tax was to be applied to county and district road purposes, and there is no difficulty in separating the illegal excess from the authorized tax. The decision of the court seems to us to have been a just, equitable and practical solution of the controversy. Section 571 of the Code, under which the application in the present case was made, provides a satisfactory and adequate remedy for the individual taxpayer in all such cases; and section 841 of the Code authorizes an appeal from any levy made by the board of supervisors, which, in the opinion of the attorney for the Commonwealth is illegal, or from which he shall be required to appeal by any six freeholders of the county, thus providing an ample remedy in all cases in which the citizens of the entire county or of any district should feel themselves aggrieved by an alleged illegal tax.

The judgment complained of is affirmed.

Affirmed.

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Richmond.

VIRGINIA RAILWAY AND POWER COMPANY v. BOLTZ.

March 21, 1918.

1. APPEAL AND ERROR—*Conflicting Evidence—Negligence.*—Where the evidence is in conflict as to the charges of negligence against defendant, and the verdict and judgment of the court below is for the plaintiff, the Supreme Court of Appeals will assume that the negligence of the defendant was established.
2. APPEAL AND ERROR—*Motion to Set Aside Verdict—Plaintiff's Evidence.*—On error to a judgment for plaintiff in an action for negligence, the evidence of plaintiff's witnesses, so far as at all credible, must be accepted by the appellate court.
3. STREET RAILROADS—*Crossing—Contributory Negligence.*—Where a woman of intelligence and activity, aware of the danger of the situation, and with nothing to distract her attention or hinder her prevision, walked upon a street railway track, not at a regular crossing, but at a point twenty-seven feet beyond the crossing, without taking adequate precautions for her safety, there can be no recovery as a matter of law.
4. STREET RAILROADS—*Crossing—Look and Listen.*—The duty to look and listen is not applied with strictness to travelers crossing street railways, as it is with regard to crossing steam railroads. With respect to the former the general rule is that the failure to look and listen is not negligence *per se*, but this general rule is not inflexible, and the final test in every case is whether the court can say that the evidence furnishes no reasonable basis upon which to find that an ordinarily prudent person would have attempted to cross the track under the circumstances of the particular case.
5. STREET RAILROADS—*Right of Public to Use of Street.*—The public has an equal right with the street railway company to ride, drive, and walk upon the street between crossings, subject, however, to the superior right of way of the street cars, due to the fact that such cars must run on the tracks and cannot observe the law of the road.

Error to a judgment of the Hustings Court, Part II, of city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

E. Randolph Williams, H. W. Anderson, Thos. P. Bryan, A. B. Guigon and *Murray M. McGuire,* for the plaintiff in error.

O'Flaherty, Fulton & Byrd, for the defendant in error.

KELLY, J., delivered the opinion of the court.

Mrs. Anna Boltz was struck and injured by a street car owned and operated by the Virginia Railway and Power Company. In an action against the company to recover damages for the injury, there was a verdict in her favor, upon which the court rendered the judgment under review. We will refer to the parties hereafter as plaintiff and defendant, in accordance with their respective positions in the lower court.

The accident occurred on Eighteenth street, north of Franklin, in the city of Richmond. Franklin street runs east and west, and Eighteenth street runs north and south. The defendant company operates a double track street-car line on Eighteenth street. Mrs. Boltz had walked north from Main to Franklin on the east side of Eighteenth street, and had proceeded into Eighteenth street a short distance beyond the street crossing when she attempted to cross from the east to the west side of the latter street, and was struck by a car which came up behind her from the south, and which was running on the eastern track.

The negligence charged in the declaration and relied upon as established by the evidence is that the car was being operated at a dangerous and unlawful rate of speed, that no sufficient lookout was maintained, and that no gong or bell was sounded, or other proper warning given. The evidence is in conflict as to these charges of negligence, and

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we must, therefore, under the rule applicable in this court, assume that the negligence of the defendant was established. The theory of the defendant, however, is that, conceding its negligence, the plaintiff was guilty of contributory and concurring negligence which bars her recovery.

There are material differences between the accounts of the accident, so far as the plaintiff's conduct is concerned, as given by witnesses for the plaintiff and defendant, respectively. According to the testimony of witnesses for the defendant, the plaintiff, after crossing Franklin street, proceeded north about midway between the sidewalk and curb and the railway track until the car was nearly opposite her, when she suddenly turned to her left and stepped on the track. According to the account of the plaintiff's witnesses, however (which, so far as at all credible, we must, of course, accept), when she had proceeded across Franklin until within two or three steps of the curb on the north side of that street, and before she turned into Eighteenth street, she looked and saw no car approaching. In view of the fact that the car is shown to have stopped at the south side of Franklin street, it must then have been within the block and, therefore, within the line of her vision; but be this as it may, it is not material, because the question before us is not whether her outlook at that point would have been due care, if she had then gone straight across Eighteenth street on the flag-stone crossing at that point. Instead of doing this, she walked diagonally up the street and went upon the track at a point twenty-seven feet north of the crossing. She had made the observation mentioned above before she had crossed Franklin, when she was, as she says, two or three steps off of the curb of the sidewalk on the north side of that street. The sidewalk is ten feet, eleven inches wide. If she was two or three steps from the curb when she looked, and was twenty-seven feet north of the flag-stone crossing when she was struck, she

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necessarily walked more than thirty feet after she looked for the car and before she went on the track. She was an active, intelligent woman, perfectly familiar with the situation, and stated that she always looked for cars at that point. Her testimony shows that she knew it was incumbent upon her, as a matter of care and precaution, to look at this time before going on the track, and she testifies that immediately before she stepped on the track she looked a second time and saw no car; but this statement cannot possibly be true and must be disregarded. *N. & W. Ry. Co. v. Strickler*, 118 Va. 153, 155, 86 S. E. 824. According to her own statement (she says she was in a hurry and walking fast), the collision with the car must have occurred almost simultaneously with her entrance upon the track. There was nothing to obstruct her view, and if she had looked the second time, as claimed by her, she could not have failed to see the car. If she should seek to escape this conclusion by contending that one of her witnesses said the car was standing still on the south side of Franklin street when she was already between the rails, and that she was under no obligation to look that far back before entering the track, she destroys her claim that she hurried across and thus convicts herself of remaining carelessly and unnecessarily upon the track when she knew there was danger.

The case simply resolves itself into one in which a woman of intelligence and activity, aware of the danger of the situation, and with nothing to distract her attention or hinder her prevision, walked upon a street railway track, not at a regular crossing, but at a point twenty-seven feet beyond the crossing, without taking adequate precautions for her safety. In such a case, upon settled principles, there can be no recovery as a matter of law.

We are not unmindful that the duty to look and listen is not applied with strictness to travelers crossing street railways, as it is with regard to crossing steam railroads, and

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that with respect to the former the general rule is that the failure to look and listen is not negligence *per se*, but this general rule is not inflexible, and the final test in every case is whether the court can say that the evidence furnishes no reasonable basis upon which to find that an ordinarily prudent person could have attempted to cross the track under the circumstances of the particular case.

"The look and listen rule is not applied with strictness to travelers crossing street railway tracks. But a person about to cross or go upon a street car track must use ordinary care in view of all the circumstances and surroundings. He must make reasonable use of his eyes and ears to note the approach of cars, and where there is nothing to obstruct his view or distract his attention and he goes upon the track immediately in front of a moving car he is guilty of negligence. He should look for approaching cars at a place and time when such looking will be effectual." 8 Thomp. on Neg. (White's Supp., 1914), section 1438.

"The general rule is that the failure of a traveler to look and listen before attempting to cross a street railway track is not negligence *per se;* but when the undisputed evidence establishes exceptional circumstances which so conclusively indicate negligence in failing to look or listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law for the court. The duty to look and listen depends largely on the circumstances of each case." *Idem.*, section 1443.

"Where the traveler gives a careless look and does not see or hear a car, he is in no better position than if he had not looked and listened at all." *Idem.* section 1445.

In *Glynn* v. *New York City Ry. Co.*, 110 N. Y. Supp. 837, the court said, in a case arising out of a collision between a pedestrian and a street car: "He was not at a crossing, but in the middle of the block between 130th and 131st streets, when he was struck, and there was nothing to ob-

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struct his view. While he had a right to cross at that point, defendant had a paramount right to the use of its tracks between intersecting streets, and it was incumbent on the plaintiff to prove that he exercised due diligence to discover the approach of the car. *Barney* v. *Metropolitan St. R. Co.*, 94 App. Div. 388, 394-395, 88 N. Y. Supp. 335; *Thompson* v. *Buffalo Ry. Co.*, 145 N. Y. 196, 39 N. E. 709; *Fenton* v. *Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967. The mere fact that at the time plaintiff left the curb he thought he had time to cross did not relieve him of the obligation to look and see where the north-bound car then was. There was nothing to obstruct his view, and by not looking at or in the direction of the approaching car after he left the curb he was guilty of contributory negligence as matter of law."

In 2 Elliott on Roads and Streets (3d ed.), section 961, it is said: "The grant of a right to use the streets of a city gives the company rights superior in some respects to those of persons riding or driving along the street, at least as between crossings. A street railway company must necessarily possess greater rights than those of the ordinary traveler, for, as is very evident, the cars of the company cannot give and take the road, but must move upon the track. It is, therefore, the duty of those traveling in the ordinary mode to leave the track in order that the movement of the cars may be unimpeded. It is held, almost without dissent, that to the cars of the company must be yielded the right of passage, and that horsemen and vehicles must leave the track when cars approach. But at street intersections or crossings their rights are said to be equal or reciprocal."

Of course the public has an equal right with the street railway company to ride, drive and walk upon the street between crossings, subject, however, to the superior right of way of the street cars, due to the fact that such cars

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must run on the tracks and cannot observe the law of the road.

The Virginia decisions are in accord with the general principles above announced and the authorities above cited. The cases of *Bass* v. *N. & W. Ry. Co.*, 100 Va. 1, 40 S. E. 100; *Richmond Traction Co.* v. *Clarke*, 101 Va. 382, 43 S. E. 618, and other cases of that type, emphasize the distinction betwen the rights of travelers in crossing street railroads and steam railroads, respectively, but in the result merely hold that under the facts of each of those cases the plaintiff was not guilty of contributory negligence as matter of law. That they did not intend to do more than this is clearly shown by subsequent cases decided by the same court and the same judges in which it was held that it was negligence as a matter of law under the facts of the particular case for the plaintiff to attempt to cross a street railway.

In *Virginian Railway Co.* v. *Johnson*, 114 Va. 479, 76 S. E. 916, this court said: "We are of opinion that the record presents a case of concurring negligence. The motorman was negligent in failing to keep a proper lookout for travelers at the Leigh street crossing; and the plaintiff was likewise guilty of negligence in driving upon the defendant's track without exercising such ordinary care for his own safety as the exigencies of the situation demanded. Each was visible to the other for a distance of from seventy-five to one hundred feet, and the accident was due to the concurrent negligence of both, which continued down to the moment of the impact. The plaintiff approached the street-car track, with which he was perfectly familiar, and over which he well knew cars were constantly passing, without taking any adequate precautions for his protection. He carelessly drove into a place of known danger with slackened rein and without looking for an approaching car until the point of collision was reached, when looking was useless,

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and the car instantly crashed into the front wheels of his vehicle. In such case, upon well settled principles, there can be no recovery."

There was, as we think, no evidence at all upon which to apply the doctrine of the last clear chance, and the most that can be made of the case from the plaintiff's standpoint is that the accident resulted from a concurrence of her negligence with that of the defendant.

The motion to set aside the verdict ought to have been sustained. The judgment complained of will be reversed, and the cause remanded for a new trial to be had, if plaintiff shall be so advised, not in conflict with the views herein expressed.

Reversed.

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Richmond.

VIRGINIA RAILWAY AND POWER COMPANY v. HARRIS.

March 21, 1918.

1. STREET RAILROADS—*Contributory Negligence—Case at Bar.*—Plaintiff driving a two-horse delivery wagon along a street which intersected a street upon which defendant's street railway ran, approached the crossing of defendant's street railway driving at a slow rate of speed. When he reached the street upon which the railway was, plaintiff looked east, and discovering no car on the westbound track (the one nearest to him), he then looked west and saw a car on the eastbound track half a block away, coming toward the crossing. Although he knew that the car was dangerously near and was approaching rapidly, he paid no further attention to it, but continued to drive across the street upon which the street railway was, without accelerating his speed, and, without even looking in the direction of the car, drove on the track in front of it. Immediately before the collision, plaintiff hearing the noise of the car turned his head and looked, and the car, he testified, was "right on top" of him.

Held: That, if the defendant was guilty of negligence, plaintiff's own negligence, which continued down to the moment of the collision, if not the proximate cause of the accident, at least efficiently and concurrently contributed thereto.

2. STREET RAILROADS—*Contributory Negligence—Case at Bar.*—It was plainly the duty of the plaintiff, when he discovered the approaching car, to keep a lookout on its movement, and to so regulate his own conduct as to avoid danger of collision. In the circumstances detailed, the dictate of common prudence demanded such precaution; and if plaintiff chose to disregard it, he was the author of his own misfortune and his contributory negligence defeats his right to recover for the consequent injury.

Error to a judgment of the Hustings Court, Part II, of the city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

H. W. Anderson, T. J. Moore and *A. B. Guigon,* for the plaintiff in error.

T. Gray Haddon and *Thos. I. Talley,* for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This is a personal injury action in which the judgment under review, awarding damages to the defendant in error, was rendered against the plaintiff in error upon its demurrer to the evidence.

The Virginia Railway and Power Company owns and operates a double track electric line in the city of Richmond, which along Main street runs east and west. The west-bound track is located north of the center line of the street, while the east-bound track is placed south of that line. The plaintiff was the only witness who testified in the case. His evidence, so far as material to be stated, is as follows: He was employed by one of the wholesale grocery merchants of the city to drive a two-horse delivery wagon. On the afternoon of November 1, 1915, plaintiff was driving the empty wagon southwardly along Seventeenth street a short distance from its intersection with Main street. He was driving along the right-hand side of Seventeenth street at a slow rate of speed—one of the horses trotting slowly and the other walking. When the horses reached the northern line of Main street, the plaintiff first looked east, and discovering no car on the west-bound track (the one nearest to him), he then looked west and saw a car on the east-bound track half a block away, coming toward the crossing. Although he knew that the car was dangerously near and was approaching rapidly, he paid no further attention to

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it, but continued to drive across Main street, without accelerating his speed (which he says was "a good ordinary walk for a fast walking horse"), and, without even looking in the direction of the car, drove on the track in front of it. Immediately before the collision, the plaintiff hearing the noise of the car turned his head and looked, and the car, he says, was "right on top" of him. It was a right angle collision, and when it occurred the horses had just cleared the track, and the car struck the front wheel of the wagon, the impact occasioning the injuries of which the plaintiff complains.

It is obvious from his version of the incident (assuming that defendant was guilty of negligence, which we do not think is shown), that plaintiff's own negligence, which continued down to the moment of the collision, if not the proximate cause of the accident, at least efficiently and concurrently contributed thereto. It was plainly the duty of the plaintiff, when he discovered the approaching car, to keep a lookout on its movement, and to so regulate his own conduct as to avoid danger of collision. In the circumstances detailed, the dictate of common prudence demanded such precaution; and if plaintiff chose to disregard it, he was the author of his own misfortune and his contributory negligence defeats his right to recover for the consequent injury.

We have many times denied recoveries in this class of cases. The following sufficiently illustrate the principles upon which this decision must rest: *Virginia Railway & Power Co.* v. *Johnson*, 114 Va. 479, 76 S. E. 916; *Reichenstein* v. *Va. Ry. & P. Co.*, 115 Va. 862, 80 S. E. 564; *Springs* v. *Va. Ry. & P. Co.*, 117 Va. 826, 86 S. E. 65.

The principle is clearly stated in *Manos* v. *Detroit United Railways*, 168 Mich. 155, 162, 130 N. W. 664, 666 [L. R. A. 1917 C, 689], as follows: "The crucial principle in this class of cases is that one who neglects to look for a car

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when there is an unobstructed view, just before entering upon the track, and is struck by a car before he can walk directly across, is guilty of a neglect of duty in not assuring or reassuring himself that there is not a car directly upon him, of which situation the fact that he is struck is conclusive proof."

So, also, in *Fowler* v. *City of Seattle,* 90 Wash. 375, 156 Pac. 2, a recovery was denied a teamster, who, under circumstances substantially identical with those in the present case, drove on the track in front of an approaching car, of the dangerous proximity of which he had knowledge, on the ground of contributory negligence.

It may also be observed that the cases of *Derring's Admr.* v. *Virginia Ry. & Power Company,* 122 Va. 517, 95 S. W. 405, and *Virginia Ry. & Power Company* v. *Boltz,* 122 Va. 649, 95 S. W. page 467, in which opinions were handed down at the present term, are indistinguishable in principle from this case.

It follows from what has been said that the judgment under review must be reversed; and this court will enter such judgment as the trial court ought to have entered, and will sustain the demurrer to the evidence and render judgment thereon for the demurrant, the Virginia Railway and Power Company.

Reversed.

SIMS, J., dissenting:

The majority opinion holds the plaintiff in the trial court guilty of contributory negligence *per se,* because he crossed the street railway track in front and in full view of an approaching car without looking in the direction of the car again after he had seen it when it was about half a block away.

With the utmost deference, I must say that I think such holding ignores the rule established in Virginia by the case of *Richmond Traction Co.* v. *Clarke,* 101 Va. 382, 43 S. E.

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618, distinguishing street railway from steam railroad cases, in which, per opinion of Judge Buchanan, 101 Va. at page 387, 43 S. E. at page 620, this court said: "But vehicles between crossings may cross street car tracks in full view of approaching cars, if it is consistent with ordinary prudence to do so." Again, at page 388 of 101 Va., at page 621 of 43 S. E.: "Travelers may assume that street cars will give proper signals and not run at an excessive rate of speed, and they may properly walk, ride or drive across, or even along the tracks in full view of an approaching street car, if, under all the circumstances, it is consistent with ordinary prudence to do so." Again, at page 389 of 101 Va., at page 621 of 43 S. E.: "Whether or not the plaintiff was guilty of contributory negligence in driving across the street when he saw a car approaching one hundred yards off was a question for the jury under all the facts and circumstances of the case and was clearly not negligence as a matter of law." See to same effect, *N. & P. Traction Co.* v. *Forrest*, 109 Va. 658, 64 S. E. 1034; *Va. Ry. & P. Co.* v. *Meyer*, 117 Va. 409, 84 S. E. 742.

In the last cited case, the street car was about half a block away (just as in the instant case) when the plaintiff saw it approaching, and that case is otherwise, as it seems to me, directly in point in the instant case.

In the instant case, the plaintiff testified that he did not notice the speed of the car when he first saw it. He said on this subject: "I didn't pay any attention to how fast it was running when I first came into Main street; all I took notice of was a good distance off, about half a square."

In the Virginia cases cited in the majority opinion, there were other distinguishing circumstances in addition to the failure of the traveler to "look," except in the case of *Springs* v. *Va. Ry. & P. Co.*, 117 Va. 826, 86 S. E. 65. In the case of *Va. Ry. & P. Co.* v. *Johnson*, so cited, the added circumstance concerning the conduct of the plaintiff was

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his driving with loose reins, which was the proximate cause of the accident, since otherwise he could have pulled his horse back and have avoided the collision after the car was nearly upon him. In the case of *Reichenstein* v. *Va. Ry. & P. Co.*, alike cited, the plaintiff hesitated about going on the track, stood by the side of it for some time, and then stepped on the track almost immediately in front of the moving car, in which situation the duty of looking before doing so arose, which she did not perform, and which was the proximate cause of her injury. As to the case of *Springs* v. *Va. Ry. & P. Co.*, also alike cited, that was a case of a pedestrian crossing the street railway track at Ocean View at a street crossing, and the court in that case applied the doctrine of the duty to "look and listen" which obtains in steam railroad cases, as appears from the opinion itself, and did not advert at all to the different doctrine applicable to street railways as aforesaid, certainly in cities. That was an interurban street railway, however, in which the defendant owned its own right of way, and there was no ordinance limiting the rate of speed. Therefore, while the distinction is not touched upon, doubtless for these reasons the court did not apply the urban street railway doctrine aforesaid to it. As to the case of *Derring's Admr.* v. *Va. Ry. & Power Co.*, 122 Va. 517, 95 S. W. 405, also alike cited in the majority opinion, that also is a case of an interurban railway and does not involve the rights of a pedestrian upon the streets of a city. As to the case of *Va. Ry. & Power Co.* v. *Boltz*, 122 Va. 649, 95 S. W. 467, also alike cited, that did not involve the right of a traveler at a street crossing, but of a pedestrian crossing a street railway track midway of a block and very obliquely so as to undertake to walk along the street railway track in front of an approaching car under such circumstances as convicted her of concurring negligence. And, I feel very strongly that the doctrine of the case of *Richmond Traction*

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Co. v. *Clarke, supra,* is correct upon principle and should not be departed from; and, hence, with the greatest deference, I am constrained to dissent from the majority opinion.

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Richmond.

WALKER v. PENICK'S EXECUTOR.

March 21, 1918.

1. LIFE INSURANCE—*Interest of Beneficiary—Case at Bar.*—A policy of life insurance issued on the ten-payment life plan provided that the insured might, upon the surrender of the policy, with the written approval of the president, or vice-president, of the insurance company, change the beneficiary, and also that after the policy had been in force three years, the insurance company would grant, in conformity with its rules, a cash loan, and that from any sum payable under the policy there should be deducted the indebtedness of the insured or beneficiary to the company "on account of this contract or otherwise." The insured paid the premiums in advance for the first seven years the policy ran out of his individual funds. But for each of the eighth, ninth and tenth years, he borrowed from the company the amount necessary to pay the premium for the ensuing year and the interest in advance for one year on his indebtedness for such loans. And after the last loan the insured executed to the company a note in which all loans from the company were consolidated. The note provided that it should be a first lien on the policy. After the death of the insured, the amount of the policy, less the amount of the note given for loans on the policy, was paid to the beneficiary.

   Held: That the beneficiary was not entitled to recover in an action of assumpsit against the executor of the insured, the amount of the note as a debt against the estate which had been paid out of her property.

2. LIFE INSURANCE—*Interest of Beneficiary—Case at Bar.*—The beneficiary in a life insurance policy is not entitled to recover from the estate of the insured—which is solvent and more than sufficient to discharge all obligations of the estate, including bequests made in insured's will—the amount of a loan obtained by the insured from the insurer on the policy as collateral security and under the provisions contained therein, which amount was used by the insured in the payment of premiums due on the policy and interest on the loan, and which was deducted by the insurance company in a settlement under the policy with the beneficiary.

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3. EXECUTORS AND ADMINISTRATORS—*Order of Payment of Debts of Decedent.*—Where creditors will not be prejudiced thereby, every man has the right, by act *inter vivos* or by will, to appropriate his property to the payment of his debts in any order he may see fit. While, ordinarily, personal estate is the primary fund for the payment of the debts of a decedent, he may change that order, if he pleases, and the law will generally recognize and enforce it.
4. LIFE INSURANCE—*Beneficiaries—Case at Bar.*—In the instant case the policy provided for the payment of $10,000 to the beneficiary, upon proper proof of the death of the insured, but this promise was made expressly "subject to all the requirements, privileges and provisions stated" in the policy, one of which provisions was that if any loan should be made to the insured, the amount thereof "*shall be deducted*" from "any sum payable hereunder." The designation of the plaintiff as beneficiary in the policy gave her the right, if there was no change in the beneficiary, to whatever was payable on the policy, according to its terms, and nothing more. Her right to recover on the policy accrued at the death of the insured, and she was then entitled to the policy, or its proceeds. Her designation as beneficiary constituted a gift from the insured, and was never intended to, and did not, create any liability upon the donor, or his estate. This gift became effectual on the death of the donor, and consisted of whatever sum was demandable of the company at that time.
5. LIFE INSURANCE—*Indebtedness of Insured to Company—Interest of Beneficiary—Case at Bar.*—Under the terms of the policy, the company itself could not have enforced the payment of the note, after the death of the insured, out of any other fund than that pointed out by the policy as the primary fund for the payment thereof. At the death of the insured, the net sum due on the policy was the extent of the liability of the company by reason of the policy, and, under its terms, providing for the deduction of the note, that sum was all the beneficiary was entitled to receive. As she has received that sum, no part of her estate was ever applied to the payment of the note.

Error to a judgment of the Circuit Court of Halifax county, in an action of assumpsit. Judgment for defendant. Plaintiff assigns error.

Affirmed.

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The opinion states the case.

Easley & Bouldin and *McGuire, Riely, Bryan & Eggleston,* for the plaintiff in error.

John Martin, Samuel L. Adams and *Clifton H. Penick,* for the defendant in error.

BURKS, J., delivered the opinion of the court.

On June 7, 1900, Bishop Clifton C. Penick insured his life in the Fidelity Mutual Life Insurance Company of Philadelphia for the sum of ten thousand dollars, and his daughter, the plaintiff in error, was named as the beneficiary in the policy. The policy was issued on the ten-payment life plan, which required ten annual payments or premiums of $954.40 each to be paid in advance on June 1st, of each year. The policy, among other provisions, contained the following, which are pertinent to the questions at issue: (1) "The insured, with the written approval of the president, or vice-president, may, upon the surrender of this policy, change the beneficiary;" (2) "After this policy shall have been in force three full years, the company, within sixty days after written application, will grant, in conformity with the rules then in force, a cash loan, with interest in advance at a rate not exceeding six per cent. per annum upon payment of the premium for the ensuing year, of ten times the amount stated in the table below between the parallel red lines; provided always, that the total sum loaned shall not exceed the reserve at the end of the year to which the premiums are fully paid;" and (3) "from any sum payable hereunder there shall be deducted the unpaid portion of the year's premium, if any, and the indebtedness of the insured or beneficiary to the company on account of this contract or otherwise." The insured paid the premiums

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in advance for the first seven years the policy ran out of his individual funds. For each of the eighth, ninth and tenth years, he borrowed from the company the amount of money necessary to pay the premium for the ensuing year and the interest in advance for one year on his indebtedness for such loans. The last loan was made May 29, 1909, and at that time the insured executed to the company a note in which all loans from the company are consolidated. This note, which is also signed by the plaintiff in error, was as follows:

"$3,175.30. May 29, 1909.

"I have this day received from the Fidelity Mutual Life Insurance Company the sum of thirty-one hundred and seventy-five and 30/100 dollars, as a loan on policy No. 107146, for $10,000 issued June 7, 1900, by said company on the life of Charles C. Penick, and in consideration of which I hereby promise to pay to the Fidelity Mutual Life Insurance Company, at its head office in the city of Philadelphia, Pa., the said sum of thirty-one hundred and seventy-five and 30/100 dollars, with interest thereon from June 1, 1909, until paid, at the rate of five per cent, per annum, to be paid annually in advance on the anniversary of said policy. With this note is delivered to the company said policy No. 107146, and hereby agreed that this note shall be a first lien against same.

"It is further agreed that if interest on this note or any premium on said policy be not paid when due, said policy shall be *ipso facto* null and void, and all liability of the said company by reason of same shall thereupon cease and determine. Said company is thereupon authorized, without notice to the undersigned to ascertain the cash value of said policy, according to its rules for the purchase of policies, and apply the same, first to the payment of this note and any interest or costs that may be due hereon; second to the payment of any unpaid premium note or other obli-

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gation; third to the payment of any other indebtedness of the maker or makers hereof to said company. The residue of said cash value, if any, shall then be applied by said company (at its option) to the purchase of non-participating paid-up or extended insurance (payable as the said policy is payable) for such sum or for such period of time as the said residue will purchase at the then age of the insured, or said company may, at its option, pay said residue to the member in cash, which shall be in lieu of all other benefits.

"It is further expressly agreed that if the said policy be surrendered all the values mentioned therein shall be reduced or diminished in the ratio that the amount of this note and *other* all other loans or indebtedness on said policy bears to the total cash value thereof, any law or statute to the contrary notwithstanding.

"Signed, sealed and delivered in presence of us.

C. M. YOUNG.

MARY H. PENICK.

C. C. PENICK (L. S.)

(Insured)

MARY CLIFTON PENICK (L. S.)

Beneficiary."

The whole amount borrowed was used by the insured in the payment of premiums due on the policy, and interest on the loans. The interest on this loan was regularly paid by the insured, in advance, up to the time of his death, which occurred on April 18, 1914. The policy became paid up on payment of the premium on June 1, 1909. No change was made directly in the beneficiary named in the policy. The estate of the insured was more than sufficient to discharge all of his obligations, including bequests made in his will.

After the death of Bishop Penick, the amount of the policy, less the amount of the note given for loans on the policy, to-wit: the sum of $7,310.85, was paid to the plain-

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tiff in error, and she brought this action of assumpsit against the executor of the insured to recover the amount of said note, to-wit, $3,175.30, as a debt against his estate which had been paid out of her property. The facts were agreed, and the case submitted to the judge of the trial court, without the intervention of a jury, and he rendered judgment for the defendant. To that judgment this writ of error was awarded.

The question presented for decision in this case is stated by counsel for the plaintiff in error as follows: "Whether the beneficiary in a life insurance policy is entitled to recover from the estate of the insured—which is solvent and more than sufficient to discharge all obligations of the estate, including bequests made in insured's will—the amount of a loan obtained by the insured from the insurer on the policy as collateral security and under the provisions contained therein, which amount was used by the insured in the payment of premiums due on the policy and interest on the loan, and which was deducted by the insurance company in a settlement under the policy with the beneficiary."

It is said that the precise question here involved has not been passed upon in this, or any other, jurisdiction. We are free, therefore, to answer it on principle as seems to be fair and just.

In some jurisdictions it is held that where the insured has the arbitrary right to change the beneficiary at will, the beneficiary has no estate of any kind in the policy during the life of the insured, but a mere expectancy, quite similar to that of a legatee during the life of the testator. But if no such change is made, then upon the death of the insured the right of the beneficiary becomes fixed and vested. *Freund* v. *Freund,* 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283; Vance on Insurance, page 399, and cases cited. In other jurisdictions it is held that the beneficiary has a vested interest in the policy liable to be defeated by

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a change of the beneficiary. *Hopkins* v. *Hopkins*, 92 Ky. 324, 327, 17 S. W. 864; *Indiana Nat. Life Ins. Co.* v. *McGinnis* (Ind.), 99 N. E. 756; *Tyler* v. *Treasurer*, 226 (Mass.) 306, 115 N. E. 300; *Holder* v. *Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853. Which of these views is correct it is unnecessary for us to decide. The question for our consideration is what amount under the facts of this case, is the beneficiary named in the policy entitled to receive. Is it the gross value of the policy, or its value after deducting the loan note?

The theory of the plaintiff's case is that the loan note evidenced a debt owing by the insured for which she was not bound at all, or, if bound, then only as surety or *quasi* surety; that the gross value of the policy was her property, by reason of the fact that she was the beneficiary named in the policy; and that this property of hers has been taken to pay the debt of the assured, and that by analogy, at least, to the exoneration of a specific legacy, or the subrogation of a surety, she is entitled to recover from the executor of the insured the amount of the loan note which was deducted from the policy on the settlement made with her.

The policy of insurance was a contract between the insured and the insurer which they could alter or amend at pleasure, without consulting anyone; and, while it is true that the policy declares how the beneficiary may be changed, it was entirely competent for the parties to waive that method and substitute any other that was mutually agreeable to them, and if the company chose by word or act to permit the insured to substitute himself, in whole or in part, as the beneficiary under the policy, no complaint thereof could be made by the beneficiary named in the policy. The transaction, in the instant case, amounted to a designation by the insured, with the consent of the company, of himself or of his estate, as the beneficiary of the policy to the extent of the loan.

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Furthermore, where creditors will not be prejudiced thereby, every man has the right, by act *intervivos* or by will, to appropriate his property to the payment of his debts in any order he may see fit. While, ordinarily, personal estate is the primary fund for the payment of the debts of a decedent, he may change that order, if he pleases, and the law will generally recognize and enforce it. In the instant case, the policy and the loan were not wholly separate and distinct transactions, for when the policy was issued it provided for the loan, and a limit upon the amount thereof, and the insured, with the consent of the insurer, provided the order in which his estate should be appropriated to the payment of such loan. The policy declares that from any amount payable thereunder, there *shall be* deducted the indebtedness of the assured to the company. This was not a mere privilege reserved by the company for its own protection. It was a stipulation between the two parties to the contract in which each was interested, and which they might waive, if they so elected, but from which neither could recede without the consent of the other. Nor did it merely create a lien on the policy. The note itself stipulated that it "shall be a first lien" on the policy, but the provision of the policy went further and *required* the company to deduct the note "from any sum payable hereunder." The loan was a compulsory loan to the assured under the terms of his contract, and from the time it was made he knew that there was, under the terms of his contract, practically no personal responsibility upon him, for, if the company continued solvent, upon his death, the company was obliged to deduct the loan from the policy. It is not probable that he ever conceived the idea that he was creating a debt to be paid otherwise than out of the proceeds of the policy.

It has been very earnestly argued before us that the company, in making this loan, was not in any different position from any other lender of money on collateral se-

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curity, and *Stratton* v. *New York Life Ins. Co.*, 115 Va. 257, 78 S. E. 636, is cited in support of the position. Aside from the fact that the facts of that case are essentially unlike those in the instant case, and the questions involved wholly different, the utmost that can be claimed for the meaning of the language used in that case is that an insurance company, in making a loan on its policy, does not occupy any different position from any other lender of money *upon like security* and a *similar contract.* The loan in the instant case was compulsory. The insurance company was compelled to make it under the terms of its contract. It could not decline. In the language of the facts agreed, "all of these loans were granted by the company because of the obligation imposed upon it to do so by the policy." Not only so, but the loan was a continuing loan. Within the limits prescribed by the policy (and the loan here was within those limits) the assured had the right to demand the loan during the life of the policy. The company recognized this right and made the loan. Having made the loan, it could not call it in, as long as the interest and premiums were kept paid up, because the policy gave the right to demand the loan. Not only was the loan compulsory and continuing, but the security pledged was the company's own obligation and the method of payment pointed out. It may be truly said, therefore, that the insurance company was not in any different position from any other lender of money *under like conditions.*

The policy provides for the payment of $10,000 to the beneficiary, upon proper proof of the death of the insured, but this promise is made expressly "subject to all the requirements, privileges and provisions stated" in the policy, one of which provisions is that if any loan shall be made to the insured, the amount thereof *"shall be deducted"* from "any sum payable hereunder." The designation of the plaintiff as beneficiary in the policy gave her the right, if

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there was no change in the beneficiary, to whatever was payable on the policy, according to its terms, and nothing more. Her right to recover on the policy accrued at the death of the insured, and she was then entitled to the policy, or its proceeds. Her designation as beneficiary constituted a gift from the insured, and was never intended to, and did not, create any liability upon the donor, or his estate. This gift became effectual on the death of the donor, and consisted of whatever sum was demandable of the company at that time. Under the terms of the policy, the company itself could not have enforced the payment of this note, after the death of the insured, out of any other fund than that pointed out by the policy as the primary fund for the payment thereof. At the death of the insured, the net sum due on the policy was the extent of the liability of the company by reason of the policy, and, under its terms, providing for the deduction of the note, that sum was all the beneficiary was entitled to receive. As she has received that sum, no part of her estate was ever applied to the payment of the note.

Upon the whole case, we are of opinion that the insured created the proceeds of the policy on his life the primary fund for the payment of the loan note secured by the policy; that to this extent he, with the assent of the insurance company, designated himself as the beneficiary under said policy; that the designation of the plaintiff as beneficiary in the policy only became effective at the death of the insured; that such designation, becoming thus effective, constituted a gift to the beneficiary of only the net amount recoverable on the policy at the death of the insured; and that there is not now any liability upon his estate for the amount of said loan note. Under this view of the case, no question of exoneration or subrogation can arise.

We have not deemed it necessary to make any reference to the will of Bishop Penick, though he refers to his insurance

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policies in his will, as we are informed that the construction thereof is involved in litigation now pending in the circuit court, and there is ample in the record to enable us to arrive at a correct conclusion, without making such reference.

Affirmed.

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Syllabus.

Richmond.

H. W. WILLIAMS & SONS, INC., v. POSTAL TELEGRAPH-CABLE COMPANY.

March 21, 1918.

1. TELEGRAPHS AND TELEPHONES—*Interstate Commerce—Action of Congress Exclusive.*—By act of June 18, 1910, amending an act to regulate commerce (chapter 309, 36 Statute at Large, 539), Congress has undertaken to occupy the field of interstate commerce by telegraph; and has declared that as to all such business, telegraph, telephone and cable companies are common carriers within the meaning and purposes of the act. The act further prescribes that with respect to that class of business telegraph companies shall print and publish rates, rules, classifications, regulations and practices, and file the same with the Interstate Commerce Commission; and confers upon that tribunal jurisdiction to determine what rates, etc., are just and reasonable. This action on the part of Congress is exclusive, superseding State laws on the subject, and of course is controlling upon State courts.
2. TELEGRAPHS AND TELEPHONES—*Interstate Commerce—Unrepeated Message.*—Congress having permitted telegraph companies to classify their interstate messages into repeated and unrepeated messages, and charge different rates therefor, a regulation of such a company of which the sender of the telegram has notice, limiting the liability of the company on unrepeated interstate messages to the cost of the message is reasonable and will be enforced.
3. TELEGRAPHS AND TELEPHONES—*Unrepeated Message—Case at Bar.*—Plaintiff brought his action against the defendant telegraph company for failure through carelessness and neglect to deliver a telegram to plaintiff promptly, in consequence of which plaintiff suffered a loss. The telegram was an interstate message and was unrepeated; and the blank upon which it was written contained the usual stipulation that it was sent "subject to the terms on the back thereof, which are hereby agreed to." These terms contained, among others, the following clause: "The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of

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any unrepeated telegrams, beyond the amount received for sending the same."

Held: That the telegraph company was not liable.

Error to a judgment of the Circuit Court of Northampton county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

S. J. Turlington and *Jeffries & Jeffries*, for the plaintiff in error.

Jno. N. Sebrell, Jr., for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

H. W. Williams & Sons., Inc., which we shall refer to as "plaintiff," brings error to a judgment of the Circuit Court of Northampton county sustaining the demurrer of the Postal Telegraph-Cable Company, a corporation, which will be designated as "defendant," and dismissing the suit.

The material allegations of the declaration are: That at 4:45 P. M. on Saturday, June 17, 1916, H. M. Williams Brokerage Co., a brokerage company of Buffalo, New York, delivered to defendant at that city the following telegram, addressed to plaintiff at Cape Charles, Virginia: "Market closed for day if you agible fob for three cars let them come here if good stock wire car numbers mail bills of lading bender. H. M. Williams Brokerage Co." This cipher telegram was understood between the sender and plaintiff to mean: "Market closed for day. If you cannot get $4.00 F. O. B. for three cars, let them come here if good dry stock, wire car numbers, mail bills of lading. All well here." By that telegram the H. M. Williams Brokerage Company offered on that day to purchase from plaintiff certain car-

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loads of potatoes at the price of $4.00 per barrel, if the offer was accepted at once, and the potatoes forthwith shipped according to the terms of the telegram. But that defendant did not send and deliver the telegram promptly, and through carelessness and neglect failed to deliver the same until 11:45 A. M. on Monday, June 19, 1916. That by reason of the delay of defendant in delivering the telegram, the potatoes were not shipped in time to be delivered in accordance with its terms; and when delivered the market had fallen, in consequence of which plaintiff suffered a loss of $429.43 for the recovery of which this action was brought.

The telegram was an interstate message and was unrepeated; and the blank upon which it was written contained the usual stipulation that it was sent "subject to the terms on the back hereof, which are hereby agreed to." These "terms" are familiar to the profession, and need not be her repeated at large. Suffice it to say that they contained, among others, the following clause: "The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED telegrams, beyond the amount received for sending the same."

By act of June 18, 1910, amending an act to regulate commerce (Ch. 309, 36 Stat. at Large, 539), Congress has undertaken to occupy the field of interstate commerce by telegraph; and has declared that as to all such business, telegraph, telephone and cable companies are common carriers within the meaning and purposes of the act. The act further prescribes that with respect to that class of business telegraph companies shall print and publish rates, rules, classifications, regulations and practices, and file the same with the Interstate Commerce Commission; and confers upon that tribunal jurisdiction to determine what rates, etc., are just and reasonable. This action on the part of Congress is exclusive, superseding State laws on the sub-

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ject, and of course is controlling upon State courts.

The principles here involved were gone into so fully by this court in the case of *Boyce* v. *Western Union Telegraph Co.*, 119 Va. 14, 89 S. E. 106, as to obviate the necessity for extended discussion. It was there held that "Congress having permitted telegraph companies to classify their interstate messages into repeated and unrepeated messages, and charge different rates therefor, a regulation of such companies of which the sender of the telegram has notice, limiting the liability of the company on unrepeated interstate messages to the cost of the message is reasonable and will be enforced."

This case is cited with approval by the Interstate Commerce Commission in the case of *J. L. & Myrtle Cultra, Partners Trading as the Clay County Produce Company* v. *Western Union Telegraph Co.*, decided May 17, 1917. It was there held that "The defendant's repeated, unrepeated, and special value rates for the transmission of interstate messages, with the restricted liability attaching thereto, being expressly sanctioned by section 1 of the act to regulate commerce, are binding upon it as well as upon all others when such rates have been lawfully fixed and offered to the public, and may not be departed from until they have lawfully been changed."

We fail to appreciate the force of the contention, that the stipulation attached to the blank on which this message was written, that "the company shall not be liable for * * * delays in the transmission or delivery, or for non-delivery, of any *unrepeated* telegrams, beyond the amount received for sending the same," is *inapplicable* to the case in judgment. The gist of the action was alleged *delay* in the *transmission* and *delivery* of the telegram in question, and the message being unrepeated exemption from liability in express terms applied to that situation. In the above case it is true that the Interstate Commerce Commission points

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out that certain provisions of the act of Congress were not applicable to the case before them; but there is no suggestion that the clause referred to would be inapplicable to the facts alleged in plaintiff's declaration. On the contrary, they say: "It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public, they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and Federal courts." *Unrepeated Message Case*, 44 I. C. C. R. 670, 678.

The judgment of the Circuit Court of Northampton county is plainly right and is affirmed.

Affirmed.

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Richmond.

BROOKLYN TRUST COMPANY AND OTHERS v. BOOKER, COMMISSIONER.

March 28, 1918.

1. TAXATION—*Trusts and Trustees—Choses in Action—Non-Resident Trustee.*—Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a non-resident trustee, the State can levy a tax on such fund, although such choses are not, and never have been, within the State, and the trustee is and always has been a non-resident of the State.

Error to a judgment of the Circuit Court of Elizabeth City county, on a motion to correct an erroneous assessment of taxes. Judgment for the Commonwealth. Plaintiff assigns error.

Reversed.

The opinion states the case.

Jones & Woodward, for the plaintiff in error.

Attorney-General J. D. Hank, Jr., O. L. Shewmake, J. Vaughan Gary and *E. E. Montague,* for the defendant in error.

BURKS, J., delivered the opinion of the court.

The record in this case presents two questions for our consideration.

1. Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a non-resident trustee, can this State levy a tax on such

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fund, when such choses are not now, and never have been, within this State, and the trustee is and always has been a non-resident of this State?

This question is answered in the affirmative by *Wise, Trustee,* v. *Commonwealth,* 122 Va. 693, this day decided, where the reasons therefor are given.

2. Was the life tenant of the fund in controversy a citizen of this State at the time the assessment was made?

It could serve no useful purpose to set out the evidence on this subject in full, as similar facts could hardly arise in another case. It must suffice to say that we have given the evidence a most careful and painstaking examination, and it leaves no doubt upon our minds that the residence of such beneficiary was, at the time of such assessment, and has been ever since, in the State of New York, and not in the State of Virginia.

What constitutes residence, within the meaning of the tax laws of this State, has been so exhaustively considered in the recent case of *Cooper* v. *Commonwealth,* 121 Va. 338, 93 S. E. 680, that we deem it unnecessary to say more on that subject.

The judgment of the Circuit Court of Elizabeth City county must be reversed.

Reversed.

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Syllabus.

Richmond.

TORBERT V. ATLANTIC COAST LINE RAILROAD COMPANY.

March 28, 1918.

1. FIRES—*Evidence—Engine Throwing out Sparks.*—In an action for damages by plaintiff for the destruction of his property by fire alleged to have been set out by sparks or coals dropped or thrown from one of the locomotive engines or trains of defendant, it was prejudicial error to refuse to allow the plaintiff, on examination in chief as a witness in his own behalf, to answer the following question: "State whether or not engines of the defendant * * * drawing freight trains southward * * * throw sparks and coals as they pass the point at which your property is located."
2. FIRES—*Evidence—Engine Throwing out Sparks—Case at Bar—Appeal and Error—Reversible Error.*—In the instant case the undisputed fact was, that the train of the defendant, from which plaintiff's evidence tended to show the fire originated, passed along by a shed between lines of box cars standing on each side of the main line track, which of itself, according to known physical laws, in the resistance given by such lines of box cars to the air displaced by the defendant's moving train, might have caused ample disturbance of the air to have carried sparks or coals, if thrown out by the engine of such train, the short distance of twenty-five feet from the engine to the debris on the side of the shed, where the fire originated according to the testimony for the plaintiff. Therefore, whether or not such engine in fact threw sparks and coals as it passed said locality was a material fact in the instant case, upon the plaintiff's theory of the origin of the fire. Hence, the error in excluding the circumstantial evidence referred to in the preceding headnote was plainly harmful error to the plaintiff and therefore reversible error.
3. INSTRUCTIONS—*Weight of Evidence.*—An instruction upon the subject of the weight and effect of the evidence must be carefully drawn so as not to invade the province of the jury under our procedure. Under that procedure they are the sole judges of the credibility of witnesses and of the weight to be given to the evidence in a case.
4. FIRES—*Instructions—Weight of Evidence.*—In an action for

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damages by fire alleged to have been set out by a railroad, an instruction that the jury could not "presume from the happening of the fire that it was caused by the defendant. * * * In other words, it is incumbent upon the plaintiff to show how the fire occurred and the plaintiff cannot leave to the jury the determination of the question by conjecture, guess or random judgment or upon mere supposition," is erroneous. It is in effect an instruction to the jury that they could not, in the instant case, presume (*i. e.*, could not draw the inference of fact) from the happening of the fire, under the circumstances shown by the evidence for the plaintiff, that it was caused by the defendant. That was precisely such an inference of fact as the jury might have been warranted in drawing in the instant case, in view of the undisputed facts and of the evidence for the plaintiff.

5. FIRES—*Circumstantial Evidence—Presumption Based Upon Presumption.*—The fundamental error in the instruction set out in the preceding headnote is that an ordinary reader or juror would be apt to construe it to mean that a jury cannot draw an inference of fact from circumstantial evidence; that such an inference is a presumption based upon a presumption, which cannot serve as an intermediate fact from which (along with other circumstantial evidence) the jury may draw another inference of fact. The error of this position is pointed out by the Supreme Court of Appeals in the case of *C. & O. Ry. Co.* v. *Ware, ante,* page 246, 95 S. E. 183.

Error to a judgment of the Circuit Court of Norfolk county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

This is an action for damages by the plaintiff in error (hereinafter referred to as plaintiff) against the defendant in error (hereinafter referred to as defendant) for the destruction of a shed and its contents of lumber, all owned by plaintiff, by fire alleged to have been set out between midnight and three o'clock a. m. of November 7, 1915, by sparks or coals dropped or thrown from one of the locomotive engines or trains of the defendant.

Certain evidence for plaintiff was excluded by the trial

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court over the objection of the plaintiff; and a certain instruction was given by such court at the request of the defendant over the objection of the plaintiff.

UNDISPUTED FACTS.

Plaintiff's wooden shed, containing lumber, with roof covered with metal, was located on the east side of defendant's railroad and immediately adjacent to its right of way. The side of the shed next to the railroad was about 136 feet long, and that side of it was closely weatherboarded with German siding, having no opening therein on the night of the fire. This weatherboarding came practically down to the ground. The eaves of the shed were about fourteen feet high, and about a foot higher than the tops of a line of box cars which were standing on a side track of defendant along by the shed at the time of the fire. The track of the main line of the defendant used by trains going south passed within twenty-five feet of such side of the shed. There was a space of about eighteen or twenty inches between the box cars on the said side track and the shed, with the usual open spaces between the ends of the box cars as they stood coupled together or end touching end on the side track. The shed was forty-six feet wide. It was not heated in any way and contained no electric wires. The ends and other side of the shed were not closely boarded up. No one could enter the shed from those ends or sides, but any one standing on the outside of such ends or side of the shed could look through openings in the boarding into the interior of the shed. The door of the shed, which was at its northeast end, was locked at the time of the fire. No one slept or stayed in the shed at night. The shed was on a lumber lot of considerable size which was enclosed partly by a solid board fence about six feet high, and partly by a wire fence some five feet high, with several strands of

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barbed wires on top of it, and the gates or openings in the fence, and in another shed forming part of the enclosure, were locked at the close of business of plaintiff the night before the fire and were still locked at the time of the fire.

The fire in question originated either within the shed toward its northeast end and about midway inside of it, or on the outside of the weatherboarding of German siding next to defendant's railroad by catching afire next to the ground; and the fire was first discovered about 2:30 a. m. of November 7, 1915.

There was also a side track on the opposite side of defendant's main line from said shed on which a number of box cars were standing. Any train therefore passing along defendant's main line would, as it passed said shed, have run between two lines of box cars, which would have been very near to the passing train.

THE MATERIAL CONFLICT IN THE EVIDENCE.

Evidence for Defendant.

The evidence for the defendant tended to show that the fire originated inside of the shed. That there was no dry grass, paper, etc., on defendant's right of way, heaped up against the weatherboarding of plaintiff's shed on that side of it, from which the fire could have been communicated to the shed, as plaintiff's witnesses testified. That there was no train of defendant which passed by the shed preceding the fire nearer than about 1:10 a. m. of the night of the fire. That at the time the fire originated, and shortly preceding, there was a slight wind blowing and that this was blowing from the shed towards the railroad. That the 1:10 a. m. train referred to was a freight train going south. That there was a very slight if any grade in the railroad main line track going south, so that there was no pulling of

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any grade sufficient to cause any train going south to throw sparks.

Evidence for Plaintiff.

The evidence for the plaintiff which was admitted by the trial court, tended to show that the fire originated on the outside of the shed by the weatherboarding or German siding next to defendant's railroad catching afire next to the ground, being communicated from dry grass, paper, etc., thrown and left there some time before by defendant's section hands, such debris extending from the ends of the ties of the side track aforesaid some eighteen or twenty inches in width to the weatherboarding of that side of the shed, and being heaped up several inches high against such weatherboarding of the shed. That a freight train of the defendant going south passed the shed about two o'clock a. m. of the night of the fire. That a short time after the fire originated there was absolutely no wind, but a dead calm in the locality of the shed, even on the west side of it, the direction from which the defendant claimed a wind was blowing; and the uncontroverted evidence is that at that time there was more wind in that vicinity than there had been for several hours next preceding. Hence the jury were warranted in finding, and therefore we must find it to be a fact that at the time of the origin of the fire there was no wind, but a dead calm, in the locality of the shed. That there was some grade in the railroad main line track going south over which said train passed; and the plaintiff would have introduced testimony to the effect that all freight trains going south did in fact throw sparks and coals as they passed said shed, but the trial court refused to allow the introduction of such proof before the jury, as is more particularly set out in the opinion below.

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THE INSTRUCTIONS.

There were but three instructions to the jury given by the trial judge, one as asked for by the plaintiff and two as asked for by the defendant, and they were as follows:

The following instruction was granted at the request of the plaintiff:

The court instructs the jury that if they believe from the evidence that the property of the plaintiff, mentioned in the declaration, was destroyed by fire and that such fire was caused by a spark or sparks, coal or coals, dropped or thrown from an engine of the defendant, or from an engine of the Southern Railway Company, using the tracks of the defendant, which passed near the plaintiff's said property on the 7th day of November, 1915, between the hours of 12 o'clock mid-" (some words omitted, being perhaps "night and 3 o'clock a.m.") which passed near the plaintiff's said property on the 7th they should find for the plaintiff. And if the jury shall find for the plaintiff, they should fix his damages at the value of the property destroyed, not exceeding the amount claimed in the declaration.

The two following instructions were granted at the request of the defendant:

"Defendant's Instruction No. 1. The court instructs the jury that the burden of proving that the fire complained of was caused by the engine of the defendant or by the engine of the Southern Railway Company, using the tracks of the defendant, rests upon the plaintiff and the plaintiff must prove by a preponderance of all the testimony that the fire was so caused. It is not sufficient for the plaintiff to show a mere probability that the fire was so caused. Nor can the jury presume from the happenings of the fire that it was caused by the defendant, or by the engine of the Southern Railway Company, using the tracks of the defendant. In other words, it is encumbent upon the plain-

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tiff to show how the fire occurred and the plaintiff cannot leave to the jury the determination of the question by conjecture, guess or random judgment or upon mere supposition.

"Defendant's Instruction No. 2. The court instructs the jury that in order to find for the plaintiff in this case they must believe from the greater weight of the evidence that the fire was started by a railroad engine and if the jury are unable to determine from the preponderance of the evidence what caused the fire, they should find a verdict for the defendant."

There was a verdict of the jury and judgment entered thereon for the defendant, and the plaintiff brings error.

Rumble & Campe, for the plaintiff in error.

Wm. B. McIlwaine, Bernard Mann, Williams, Tunstall & Thom, and *H. Lawrence Brooke,* for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

1. On the trial of the case, on the examination in chief of the plaintiff as a witness in his own behalf, the plaintiff was asked the following question: "Mr. Torbert, state whether or not engines of the defendant * * * drawing freight trains southward * * * throw sparks and coals as they pass the point at which your property is located."

On objection to the question the jury were withdrawn.

In the absence of the jury the witness stated that his answer to the question would be, "They do."

While the jury were absent, the witness was further asked: "* * * if all the engines drawing freight trains going * * * (southward) * * * labor heavily at that point?" The witness answered: "They do."

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Thereupon the court refused to allow the witness to answer the question first above quoted.

This ruling on the part of the trial court was error. *N. & W. Ry. Co.* v. *Spates, ante,* page 69, 94 S. E. 195.

That this error was prejudicial to the plaintiff is manifest when we consider that, in view of his other evidence in the case, the jury were entitled to consider the fact that sparks or coals were thrown by the engine, under the decisions of this court. *Atlantic, etc., R. Co.* v. *Watkins,* 104 Va. 154, 51 S. E. 172; *C. & O. Ry. Co.* v. *May,* 120 Va. 790, 92 S. E. 801; *C. & O. Ry. Co.* v. *Ware, ante,* page 246, 95 S. E. 183. It is true that in the cases last cited there was a wind blowing from the defendant's railroad towards the place of origin of the fire at the time the fire originated; and in the instant case the testimony for the plaintiff was that there was no wind at the time of the origin of the fire. But the undisputed fact in the instant case is, that the train of the defendant, from which plaintiff's evidence tended to show the fire originated, passed along by the shed between the lines of box cars standing on each side of the main line track, which of itself, according to known physical laws, in the resistance given by such lines of box cars to the air displaced by the defendant's moving train, might have caused ample disturbance of the air to have carried sparks or coals, if thrown out by the engine of such train, the short distance of twenty-five feet from the engine to the debris on the side of the shed, where the fire originated according to the testimony for the plaintiff. Therefore, whether or not such engine in fact threw sparks and coals as it passed said locality was a material fact in the instant case, upon the plaintiff's theory of the origin of the fire. Hence, said error in excluding the circumstantial evidence, which would have been obtained by the admission of the evidence which was excluded, was plainly harmful error to the plaintiff and therefore reversible error.

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There was no direct evidence in the case to the effect that the engine in question threw sparks or coals in the locality of the fire. The excluded evidence aforesaid was itself, it is true, only circumstantial evidence on the question of fact whether sparks and coals were so thrown, but it was nearer in degree of proof to that inference of fact which the plaintiff sought to have the jury draw as to the sparks and coals being in fact thrown, than the evidence which the plaintiff had in the record in the absence of such excluded testimony. That is to say, without such excluded testimony, the plaintiff was compelled to rely solely on the other testimony of his witnesses, contradicted by the testimony of witnesses for the defendant, that there was such a grade in the main line track of defendant which the engine of defendant drawing the train in question had to pull, that this pulling on such up-grade caused such engine to throw sparks and coals. By said exclusion of testimony and by the giving of such instruction No. 1 for defendant, the plaintiff was prevented from relying upon a fact which was a material link in his chain of evidence.

2. Instruction No. 1, given as asked by defendant, is upon the subject of the weight and the effect of the evidence. An instruction on that subject must be carefully drawn so as not to invade the province of the jury under our procedure. Under that procedure they are the sole judges of the credibility of witnesses and of the weight to be given to the evidence in a case.

That part of the instruction which it is necessary for us to consider in the instant case is as follows:

"* * * Nor can the jury presume from the happening of the fire that it was caused by the defendant * * * In other words, it is incumbent upon the plaintiff to show how the fire occurred and the plaintiff cannot leave to the jury the determination of the question by conjecture, guess or random judgment or upon mere supposition."

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This was in effect an instruction to the jury that they could not, in the instant case, presume (*i. e.*, could not draw the inference of fact) from the happening of the fire, under the circumstances shown by the evidence for the plaintiff, that it was caused by the defendant. As we have above noted, under former decisions of this court, that was precisely such an inference of fact as the jury might have been warranted in drawing in the instant case, in view of the undisputed facts and of the evidence for the plaintiff.

The fundamental error in the instruction is that an ordinary reader or person would be apt to construe it to mean that a jury cannot draw an inference of fact from circumstantial evidence; that such an inference is a presumption based upon a presumption, which cannot serve as an intermediate fact from which (along with other circumstantial evidence) the jury may draw another inference of fact. The error of such position is pointed out by this court in the case of *C. & O. Ry. Co.* v. *Ware, supra.*

The result of the instruction under consideration in the instant case (on that feature of it which concerned what, if any, inference the jury might draw with respect to the vital question of fact of whether the engine of the defendant, pointed to by the plaintiff's evidence as the cause of the fire, did or did not throw sparks and coals as it passed the plaintiff's property), was to indicate to the jury that they could not draw such inference of fact, as to sparks or coals, from the circumstantial evidence which had been admitted in the case—namely, that the jury could not draw such an inference of fact from the circumstantial evidence that such engine was pulling a train on the up-grade, shown by the evidence for plaintiff.

As indicated in the *Spates Case, supra,* the giving of such an instruction as that under consideration, is in its nature misleading to a jury, where the case is one in which there is evidence of sufficient probative value to justify submit-

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ting the issue to the jury. In such a case the plaintiff is not left to rely on "conjecture, guess or random judgment, or upon mere supposition." Compare *C. & O. Ry. Co.* v. *Catlett, ante,* page 232, 94 S. E. 934.

It was error, therefore, for the trial court to give said instruction, and such error plainly appears from the record in the instant case to have been prejudicial to the plaintiff, and hence the giving of it was reversible error.

There are other assignments of error relating to the exclusion of testimony and the refusal of an instruction offered by plaintiff, all bearing on the question of the existence of negligence on the part of the defendant as the cause of the setting out of the fire; but as there was no evidence tending to show any other cause for the fire attributable to the defendant than the sparks or coals thrown from one of its engines, and as the sole instruction given at the request of the plaintiff submitted the case to the jury on the question of whether the fire was caused by sparks or coals as aforesaid (which amounted to submitting the case to the jury under the Featherston act, under which the negligence of the defendant is not in issue), it is deemed unnecessary to consider such assignments of error.

For the foregoing reason, the judgment complained of must be set aside and annulled, and a new trial will be granted to the plaintiff, to be had, if he is so advised, not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond.

WISE AND OTHERS v. COMMONWEALTH.

March 28, 1918.

1. ESTATES—*Estate for Life—Gift of Income—Taxation.*—A gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income.
2. TAXATION—*Trusts and Trustees—Life Estates.*—Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts 1897-8, page 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. And it is immaterial whether the trustee received his appointment from a court of this State, or his appointment is the voluntary act of the parties in or out of the State.
3. TAXATION—*Situs of Property—Policy of the Commonwealth.*—It is the policy of this Commonwealth to impose taxes on all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbol by which such property is evidenced.
4. TAXATION—*Error in Assessment—Correction by Court.*—In the case at bar objection was made to the fact that the assessment was made by the commissioner of the revenue upon information derived from the examiner of records, instead of by making inquiry of the taxpayer. If any error was made in this respect to the prejudice of the plaintiff in error, he had ample opportunity to have it corrected by the circuit court, which had power to examine into the matter and to do all that the commissioner of the revenue had power, or was required, to do in the premises under the tax laws of this State.

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5. APPEAL AND ERROR—*Former Adjudication or Res Adjudicata.*—Plaintiffs' bill of exception stated that after the introduction of certain evidence, the plaintiff moved to be exonerated from the payment of the taxes in question on the ground that the court had already passed upon the question at issue in a controversy about the taxes of a previous year and had ascertained and determined that the trust funds upon which the taxes were levied "were not subject to taxation in Virginia and that the question then presented was *res judicata*, but the court overruled the motion and refused the relief sought."

Held: That the record did not sustain the contention, that the liability of the trust fund for the taxes of the previous year was passed upon directly or indirectly in the former proceedings, and therefore no question of *res judicata* could arise in the present proceedings.

Error to a judgment of the Circuit Court of the city of Williamsburg and county of James City, on a motion to correct an erroneous assessment. Judgment for the Commonwealth. Plaintiffs assign error.

Affirmed.

The opinion states the case.

Henley, Hall & Hall, for the plaintiffs in error.

Attorney-General J. D. Hank, Jr., Assistant Attorney-General O. L. Shewmake and *Frank Armistead,* for the defendant in error.

BURKS, J., delivered the opinion of the court.

Two motions to correct erroneous assessments of taxes on intangible personal property were made in the Circuit Court of the city of Williamsburg and county of James City, one by Henry A. Wise, trustee, and the other by James A. Ballentine, trustee. The trust funds sought to be taxed were held under identical trusts, and by consent of parties the two cases were heard together. The circuit court denied the applications and dismissed the motions, and to the judgments of dismissal these writs of error were awarded.

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The facts as stated in the petition for the writs of error are as follows:

"Henry A. Wise is now, and was at the time of the assessment, as well as at the time the trusts were created, a resident of the State of New York, while James A. Ballentine is now, and was at the time of the assessment, as well as at the time the trust was created, a resident of the State of California.

"Prior to 1906 real estate situate in the county of James City, Virginia, had been held by E. C. Booth, trustee, under the will of Edwin G. Booth, deceased, for the use and benefit of Clara H. Booth, wife of E. G. Booth, and their children. In 1906 the real estate in James City county was sold in a suit brought for that purpose, and all the parties were before the court. The purchase money was brought into court and under decree entered on January 28, 1907, E. G. Booth, trustee, was ordered to pay the purchase money derived from said real estate to Clara H. Booth (his wife), Lucy Booth Cummings, Frances Booth Ballentine, Henrietta Booth Wise, Edwin G. Booth, John Thomson Booth, Clara Thomson Booth, and William Harris Booth, his children, share and share alike, and to take their receipts therefor. The money was distributed as directed by said decree, and a report made to that effect by E. G. Booth, trustee, and by a subsequent decree the trustee was discharged and the suit dismissed.

"These funds were turned over to Henry A. Wise, who was then living in New York, as attorney for the parties, most of whom were then living in New York, $9,110.00 of this amount was turned over to James A. Ballentine, which amount went to create the trust dated March 19, 1907. The rest of the funds aggregating $25,539.00 went to create the trusts dated April 10, 1908, April 20, 1907, and April 25, 1908.

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"The provisions of the various trusts are substantially the same, and broadly stated provide that the funds shall remain in the possession and under the control of the said trustees for each of the other parties, for investment and reinvestment during the life of Clara H. Booth, and at her death, and only in that event, the trust shall cease and determine, and the estate of the said Clara H. Booth, and the other parties who contributed to said fund shall each be entitled to a distributive share in said funds in proportion to their several contributions thereto. * * *

"It is further provided that the trustee shall, after deducting his expenses, pay to Clara H. Booth the interest from investments made by him, and that the amounts so paid shall be the sole and separate property of said Clara H. Booth.

"It is further provided that the trustee shall render to each of the parties to said agreement annually a full and accurate account and report of the investment made by him."

The statute under which the assessments were made in this case is section 492 of the Code, which, so far as need be quoted, is as follows:

"If the property is the separate property of a person over twenty-one years of age, or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside. * * * If the property is held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided)."

This statute was construed in *Selden* v. *Brooke*, 104 Va. 832, 52 S. E. 632. In that case the facts were that there was a trust fund under the control of the Corporation Court of the city of Norfolk, in which Elizabeth T. Selden

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had an estate for her life. For that fund the Corporation Court of the city of Norfolk appointed a trustee, and directed him to pay the income and revenue accruing therefrom to Elizabeth T. Selden, the *cestui que trust,* during her natural life. The life tenant resided in the city of Norfolk, but some of the remaindermen and the trustee were non-residents, and the choses in action in which the trust fund was invested were at all times during the years for which the taxes were assessed kept by the trustee in his personal possession outside of the State. The decision of this court, as appears from the syllabus, was that, "Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts 1897-8, p. 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury." The decision is rested upon the ground that it is the policy of this Commonwealth to impose taxes on all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbol by which such property is evidenced. Furthermore, it is said: "Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, a resident of the Commonwealth, who enjoys the protection of its laws along with other citizens, and ought, in fairness, to contribute her due proportion of revenue for the support of the government. * * *

"If the construction contended for on behalf of the appellant, that the domicile of a non-resident trustee fixes the *situs* of intangible personal property for purposes of

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taxation, were to prevail, it would afford ready means of escape from taxation and divert from the treasury of the State a very large amount of revenue to which, in our judgment, it is justly entitled. The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury. *Hunt* v. *Perry*, 165 Mass. 287, 43 N. E. 103; *Lewis* v. *County of Chester*, 60 Pa. 325."

Not a word is said about the trustee being an appointee of a court of this State or his accountability to such court, nor is there an intimation that the result would have been different if the appointment had been by the voluntary act of the parties in or out of the State. Indeed, the last paragraph quoted above would seem to indicate that the result would have been the same if the appointment had been by such voluntary act of the parties.

In the instant case no express life estate is given in the corpus of the fund from which the interest or income is to be derived, but it is stipulated that "said trustee shall, after deducting his expenses, remit to the said Clara H. Booth all sums received by him as interest from investments and deposits as received" during her natural life, "and that such remittance shall be the sole and separate property of the said Clara H. Booth." It is a conceded fact that Mrs. Booth was to receive the entire income from the trust subject during her natural life, subject to no deduction except the expenses of the trustee in handling the fund, or, in other words, the entire net income. What other or different interest would she have had, what more could she have gotten from it, if the corpus had been conveyed to the trustee in trust for the life of Clara H. Booth, with remainder to the founders of the trust? A gift to another for his

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life of the entire income and interest to be derived from a trust fund is a gift of a life estate in the fund. The quantity of the estate is the same, no matter by what name it is called, and it is this quantity of estate to which the tax laws apply.

In *Walker* v. *Hill,* 73 N. H. 254, 60 Atl. 1017, a devise to a wife of "the income of the remainder of my estate during her natural life" was held to give to the wife a life estate in the property. In *Little* v. *Coleman,* 74 N. H. 215, 66 Atl. 483, there was devised to one daughter "the use of my farm Vassalborough" during the term of her natural life, and to other daughters "the income from all the rest and residue of my real estate and personal property" during the term of their natural lives, and in each case it was held that the devises constituted life estates in the property. The question seems to have been passed upon quite often in Tennessee, though it was not always necessary to the decision of the case. We quote from one of the late cases. In *Johnson* v. *Johnson,* 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am. St. Rep. 104, it is said: "We are of opinion that if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is, in effect, a devise of the property itself. *Polk* v. *Faris,* 9 Yerg. (Tenn.) 241, [30 Am. Dec. 400]; *Morgan* v. *Pope,* 7 Cold. (Tenn.) 547; *Davis* v. *Williams,* 85 Tenn. 648, 4 S. W. 8; *Pilcher* v. *McHenry,* 14 Lea (Tenn.) 88; 1 Jarm. Wills, 152, note; 3 Washb. Real Prop. 529, 530; *Spofford* v. *College,* (Jan. 1889). In the case last mentioned, Thomas Martin, of Giles county, had set apart $30,000 in bonds of the State of Tennessee, the interest to be applied to the founding and operating of a female school at Pulaski, Tenn. After the school had been founded, and successfully operated for a

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number of years, Mrs. O. M. Spofford, his only daughter and residuary legatee, filed a bill claiming that only the interest upon the bonds was devoted by the will of her father to the school, and that when the bonds matured, and the interest coupons had all been clipped and exhausted, then the bonds or corpus of the fund would revert to her, as residuary legatee under the will. The court below, as well as this court, held that the gift of the interest of the bonds carried the bonds themselves, and the fund could not be diverted from the charity."

In 17 Ruling Case Law, 620, (citing cases from Iowa, Connecticut, Pennsylvania and other States) the law is stated thus: "A devise or bequest of the 'use and improvement' of property during the life of the devisee, or of the rents, profits and income of the property for life, is in effect a devise of the property itself for life."

Independent of precedent, it seems clear that a gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income.

In the instant case, Mrs. Booth has an estate for her life in the trust fund in controversy, and as she resides in this State her trustee is properly chargeable here with the taxes from which he seeks relief. It is the duty of the life tenant who receives the entire income to pay the taxes on the corpus.

This is no hardship on the life tenant. She occupies the same position as any other life tenant in this State of intangible personal property. The property in which she has a life estate is taxable at the place of her residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth* v. *Williams*, 102 Va. 778, 47 S. E. 867. If it were otheriwse, citizens of this State could, by creating foreign trusts, deprive the State of a very large part of its revenue.

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Objection is made to the fact that the assessment was made by the commissioner of the revenue upon information derived from the examiner of records, instead of by making inquiry of the taxpayer. If any error was made in this respect to the prejudice of the plaintiff in error, he had ample opportunity to have it corrected by the circuit court, which had power to examine into the matter and to do all that the commissioner of the revenue had power, or was required, to do in the premises under the tax laws of this State. *Commonwealth* v. *Schmelz,* 114 Va. 364, 76 S. E. 905; *Commonwealth* v. *United Cig. M. Co.,* 119 Va. 447, 89 S. E. 935.

The language of Harrison, J., in *Bridgewater Man. Co.* v. *Funkhouser,* 115 Va. 476, 79 S. E. 1074, is peculiarly applicable to this assignment of error. He says: "The complainants make several technical objections to the time and method of this assessment, insisting that it was not made according to law. These objections are without merit. The underlying principle in such cases is that a person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions or irregularities that do not prejudice his rights. *Stevenson* v. *Henkle,* 100 Va. 591, 595, 42 S. E. 672; *Yellow Poplar Co.* v. *Thompson,* 108 Va. 612, 62 S. E. 358; *Coles* v. *Jamerson,* 112 Va. 311, 71 S. E. 618, 50 L. R. A. (N. S.) 407.

"It is clear from the record that the objections are not well taken and that the complainant suffered no prejudice from the method of assessing the taxes it now seeks to avoid."

It is also assigned as error that the trial court erred in not holding that the question at issue in this cause is *res judicata.* This assignment of error is set forth in the petition for this writ of error as follows:

"It will be observed that for the year 1915 the identical

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funds were assessed with State and city taxes in the name of E. G. Booth, trustee, evidently under the theory that the proceeds derived from the sale of the land sold in James City county were still under the control of E. G. Booth, notwithstanding the final decree hereinbefore referred to, which had discharged him as trustee, and dismissed the suit. Upon the motion of E. G. Booth to be exonerated and relieved from the payment of such taxes, and upon its being brought to the attention of the court that there were no funds in his hands, at the instance of the attorney for the Commonwealth and for the city of Williamsburg, Clara H. Booth and Clara Thomson Booth were made parties to said proceedings, and upon similar facts to those set out in the record in those proceedings, the court by its order ascertained and determined that the said funds were not subject to taxation in Virginia.

"It is true that Henry A. Wise, trustee, and James A. Ballentine, trustee, were not before the court at that time, but it is admittedly true that they are both non-residents of the State of Virginia, and that if the funds are taxable in Virginia at all, it is due to the residence of Clara H. Booth, and that while the assessment is made in the name of the trustees, it is in effect against Clara H. Booth. This being true a court of competent jurisdiction has passed upon similar facts as those now presented, when the same parties in interest were before the court. We therefore respectfully submit that the question presented is *res judicata*, and that the defendants are estopped from denying the correctness of the ruling of the court, or of the validity of its judgment."

The record does not sustain the contention. The record of the proceedings to correct the assessment for 1915 was not put in evidence in this cause, nor was any other evidence offered on the subject except the stipulation of counsel used in lieu of evidence. The only part of that stipula-

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tion which relates to this subject was paragraph 4 which is in the following words and figures:

"(4). It is further stipulated and agreed that upon the motions to be relieved from the assessment of the aforesaid State and city taxes, Sydney Smith, the examiner of records who made said assessment was examined as a witness, and testified that he got his information upon which to base said assessment from copies of trust agreements which had been filed as a part of the evidence in a motion made by E. G. Booth, trustee, to be relieved from the payment of State and city taxes on the aggregate sum of $30,000.00 for the year 1915, in which motion relief was granted the said E. G. Booth, trustee; that in said last mentioned proceeding, Clara H. Booth and Clara Thompson Booth were made parties and were before the court."

This paragraph showed that E. G. Booth, trustee, was relieved, and it is manifest that he should have been. It also shows that Clara H. Booth and Clara Thompson Booth "were made parties and were before the court," but at whose instance or for what purpose they were made parties, or what judgment as to them was entered, is not made to appear. There is no evidence that the question of the liability of this trust fund for the taxes of 1915 was passed upon directly or indirectly. For aught that appears in this record, that proceeding may be still pending in the trial court, or there may have been a judgment against Clara H. Booth for the amount of the tax, or the proceeding against her may have been dismissed. On all these questions the record is simply silent. It is true that plaintiffs' bill of exception No. 1 states that after the evidence hereinbefore referred to had been introduced, the plaintiff moved to be exonerated from the payment of the taxes *on the ground* that the court had already passed upon the question here at issue in the controversy about the taxes of 1916 and had ascertained and determined that the trust funds herein-

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before referred to "were not subject to taxation in Virginia and that the question then presented was *res judicata,* but the court overruled the motion and refused the relief sought." This is far from showing that there was any evidence in the record to support the *ground* alleged. The absence of such evidence may have been the very reason for refusing the motion. No question of *res judicata,* therefore, can arise. The judgment of the circuit court must, therefore, be affirmed.

Affirmed.

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Richmond.

McCLANAHAN'S ADMINISTRATOR v. NORFOLK AND WESTERN RAILWAY COMPANY.

January 24, 1918.

(Rehearing refused, Wytheville, June 13, 1918.)

1. ADVERSE POSSESSION—*Lien of Judgments against Former Owner—Case at Bar.*—In a creditor's suit the commissioner to whom the cause was referred reported numerous judgments as alive and subsisting liens on the real estate of the judgment debtor. He also reported numerous parcels of real estate liable to the lien of said judgments, and a lot which had been conveyed to the judgment debtor and which had never been conveyed to anyone by him, in the possession of a railway company, which claimed the same by the most notorious acts of adverse possession, exercised by itself and those under whom it claimed. The claim of the railway company to title by adverse possession was decisively supported by all the essential elements of such a title. Its predecessors entered into possession, before the recovery of the judgments referred to, under a color and claim distinctly adverse to, and in no wise in privity with, the title of the judgment debtor, and this possession, in most emphatic manner, had continued exclusively, uninterruptedly, visibly, notoriously, and in hostility to all other titles, for more than twenty-three years before the instant suit was brought, and for nearly thirty years before the judgment creditors asserted any claim of lien upon the property, or attempted by amended pleadings to make the railway company a party. During these decades, the adverse occupants had expended many thousands of dollars in permanent improvements on the premises.

   Held: That any title to the property claimed by the railway company which could be acquired by virtue of the lien of the judgments asserted in the instant suit would be a title held under the judgment debtor; that the right of action to assert such title would be in terms barred by section 2915 of the Code of 1904; and that the effect of this section cannot be avoided by resorting to a chancery suit.

2. ADVERSE POSSESSION—*Title Conferred by—Privity with Former*

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Owner.—The adverse occupant who has held for the statutory period does not stand in the position of a grantee from the former true owner, but his occupancy has, by authority of the State speaking through the statute, extinguished all other titles, and has vested in him an absolute and exclusive right to the possession. His title is not in any sense in privity with that of the former owner, and cannot be questioned either by such former owner or by any one claiming through him.

3. ADVERSE POSSESSION—*Title Conferred by.*—A true adverse possession for the statutory period confers upon the occupant a new, independent, unincumbered, indefeasible title, a weapon of defense and offense, good alike at law and in equity in all proceedings which call in question its validity or endanger its security. In short, such a title, though not derived from the former owner, is as good as it would be possible to acquire by deed from a former owner of a perfect title, or by a grant from the Commonwealth.

4. ADVERSE POSSESSION—*Section 2915, Code of 1904—Purpose of the Act.*—The ruling purpose and policy of this statute, which must be looked to in determining its true meaning and effect, is to give stability to land titles.

5. ADVERSE POSSESSION—*Judgment Liens—Section 2915, Code of 1904.*—In the case at bar the appellants contended that the instant case was one to enforce the lien of a judgment, not an action to recover land, and, therefore, section 2915 of the Code of 1904 did not apply; and that under sections 3567 and 3571, Code of 1904, their lien was valid and enforceable. It is true that under section 3571 of the Code the lien of a judgment may be indefinitely continued against the land of the judgment debtor in his possession, or of others holding titles derived from and in privity with him. But obviously the same rule cannot be applied to strangers who have acquired a perfect legal title not in privity with but adversely to the title of the judgment debtor. In other words, the life of a judgment may be indefinitely prolonged as to any property upon which it can operate, but whenever the right of the judgment debtor to make an entry on or bring an action to recover any land held adversely is tolled by section 2915, the right of his judgment creditor to subject such land to the satisfaction of his judgment also ceases. The lien is a vested right, but not more so than the title to which the lien attaches, and when the statute destroys the latter it necessarily destroys the former.

6. JUDICIAL SALES—*Title.*—A judicial sale of lands to satisfy liens is not a source of title, but merely a transmission of the title sold, and if at the time of the sale such title would not enable the holder thereof to make an entry or maintain an action, the purchaser cannot acquire any right of entry or action.

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7. ADVERSE POSSESSION—*Judgment Liens—Section 2915, Code of 1904.*—Theoretically and technically, a suit to enforce a lien is not a suit to recover land, but a practical and rational application of section 2915 of the Code, in the light of its object and purpose, neither requires nor permits a holding that a lien (which is a mere right to sell a title for debt) stops the statute from running in favor of an adverse occupant and enables the lienor, by a judicial sale, to infuse life into a title which the statute has annihilated.

8. JUDGMENT LIENS—*Parties—Adverse Possession.*—Assuming, but not deciding, that one who has secured title to property through adverse possession is a proper party in a creditor's suit to enforce the lien of judgments against a former owner of the property, and that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations (section 2915, Code of 1904) must be held to protect the adverse claimant if he shows sufficient facts as to the character and duration of his possession. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum.

9. VENDOR AND PURCHASER—*Parol Contract for Purchase of Land—Judgment Liens Against the Vendor.*—Where the registry acts do not apply to a parol contract for the sale of land, and where the vendee has paid all the purchase money and has been put into possession so that he has a valid equitable title to the land, it is not subject to the lien of a judgment subsequently recovered against the vendor.

10. VENDOR AND PURCHASER—*Parol Contract for Purchase of Land—Judgment Liens Against the Vendor.*—In 1876 the trustees of a school district purchased a house and lot from one Rorer upon the following terms: The trustees to pay Rorer $2,500 for the lot and Rorer to take "the school house and lot on the hill" at $500 in part payment, and the residue in equal payments in one and two years. The trustees then canvassed the town for private subscriptions, and obtained good solvent subscribers to the amount of $1,220. The board then accepted Rorer's proposition and issued its bonds for $800, which, together with the house and lot on the hill and the private subscriptions, made up the price agreed. The school trustees took possession of the property thus purchased and a few years thereafter expended $2,000 in adapting it to school purposes. They appear also to have delivered possession of the house and lot on the hill to Rorer. No deed was made by Rorer to the trustees nor by the trustees to Rorer, but the bonds given by the trustees for the deferred payments were paid, and

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from the record it sufficiently appeared that all the purchase money was paid before the complainants in the instant suit recovered their judgments against Rorer.

Held: That under the doctrine of *Floyd* v. *Harding*, 28 Gratt. (69 Va.) 401, the complainants could not subject the lot sold by Rorer to the school trustees to satisfy their judgments.

11. RECORDING ACTS—*Contracts in Writing—Case at Bar.*—The bonds referred to in the preceding headnote did not on their face refer to the contract in pursuance of which they were given, nor to the minutes of the school board, but each of them stated that it was for payment on the house and lot bought of Rorer for school purposes, and each bore an endorsement as follows: "For value received I assign the within bond to John B. Harding with permission to indulge until notified in writing to collect. (Signed) F. Rorer."

Held: That the assignment of the bonds to John B. Harding by F. Rorer, signed by the latter, did not constitute a contract in writing between Rorer and the school board within the meaning of the recording acts.

12. RECORDING ACTS—*Contracts in Writing—Case at Bar—Burden of Proof to Show Parol Contract.*—Assuming that the burden of proof in the instant case was upon the trustees to show that the contract was by parol, where, however, the rights of parties are made apparent on the public records, and they have allowed upwards of thirty years to elapse before they have made any investigation of the records to ascertain their rights, and the beneficiaries of the property are represented by trustees who are public officers receiving but little, if any, compensation for their services, and where, after the lapse of many years, all of the parties representing the public interest have died, and the loss of other evidence may have been sustained as incident to the change in office of the trustees, it is not to be expected that those representing the public interest will be able to establish the rights of their beneficiaries by that clear and satisfactory evidence which might be expected and demanded of a private individual looking after his own interest.

13. DOCUMENTARY EVIDENCE—*Record of School Board.*—The records of a school board are books of original entry and are admissible in evidence to show the acts of the board with reference to the purchase of property by it.

14. SCHOOLS—*Purchase of Real Estate—Contracts—Acts 1874-5, page 190.*—The act of 1874-5, page 190, providing that contracts for the purchase of real estate by public officers must be in writing, and the evidence of title must be submitted to the county court or judge for confirmation and approval, and

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that no contract should be valid until the title to such real estate was approved, was not enacted for the benefit of vendors of land, but to prevent the loss of public funds by investment in property the title to which was defective. It is true that it declares that the contract shall not be valid unless and until the title to the land "be thus approved," but this does not necessarily mean that the contract shall be void. The statute, like the statute of frauds, does not go to the existence of the contract, but makes written evidence necessary to evidence it. Moreover, like the statute of frauds, the right to demand compliance with the statute is a matter personal to the parties to the contract and their privies, and cannot be insisted upon by third persons.

15. SCHOOLS—*Purchase of Real Estate—Contracts—Acts 1874-5, page 190—Case at Bar.*—In the instant case it was insisted that as the contract was not in writing and as the evidence of title was not submitted to the judge, as required by the act, the school board was not bound by it, and hence there was a lack of mutuality of right and obligation, and that, where this is lacking when the contract is entered into, no subsequent act or omission of the parties can supply its place.

Held: That as parol contracts for the sale of land were valid in 1876, by parity of reasoning to cases arising under the statute of frauds, the fact that the contract was not in writing and the title to the land was not approved by the court or judge, furnishes no valid reason why the contract might not be enforced, in a proper case, against Rorer, who labored under no disability to contract.

16. VENDOR AND PURCHASER—*Judgment Lien—Extent of Lien of Judgment Against Vendor.*—Where a valid contract for the sale of land has been entered into, and the recording acts do not interfere, a judgment against the vendor after the contract and before deed to the purchaser, and before the entire purchase money has been paid, is a lien on the land only to the extent of the purchase money then unpaid. Overruling *Fulkerson* v. *Taylor*, 102 Va. 314, 46 S. E. 309, so far as it declares that "in order for a purchaser under a contract which is not required to be recorded, to be protected as to subsequent judgments against his vendor, he must, before the date of such judgment, have become invested with a perfect equitable title."

17. LIEN OF JUDGMENT—*Rights of Judgment Creditor.*—Both before and since the revision of 1887, it has been held that where the recording acts do not interfere the judgment creditor can acquire no better right to the estate than the debtor himself has at the date of the recovery of the judgment.

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18. RECORDING ACTS—*Subsequent Deeds by Grantor—Notice to Purchaser.*—After a purchaser of land has put his deed to record he is not required to watch the records to ascertain whether thereafter other deeds by his grantor or judgments against him are docketed or recorded, and the same is true of deeds of trust conveying the land. The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered.

19. RECEIVERS—*Appointment—Discretion of Court.*—The appointment of a receiver is not a matter of right, but of discretion, to be governed by the circumstances of the case, one of which circumstances is the probability of the plaintiffs being ultimately entitled to a decree. It is, moreover, a power always to be exercised with caution, and never except in a strong case. The general rule is to refuse an interlocutory application for a receiver, unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss.

20. RECEIVERS—*Creditors' Suits—Case at Bar.*—In a suit to enforce the lien of judgments upon several parcels of real estate, the trial court refused to appoint a receiver of the property reported as liable for complainants' judgments, or to hold the parties in possession thereof liable for the use and occupation thereof. Two of the defendants were in good faith and upon reasonable grounds contesting the liability of the property owned by them to complainants' judgments, and the owners of the other property joined with the complainants in seeking to hold the property of these defendants liable, because if these properties were held liable they would probably produce sufficient to pay off and discharge the judgments, thereby relieving the property of such owners from any liability for the judgments.

Held: That there was no error in the ruling refusing to appoint a receiver. The rights of the parties had not been determined at the time the receiver was asked for, nor had it been ascertained and adjudicated what property should be subjected to the discharge of such judgments. In such circumstances, the appointment of a receiver whereby the parties would have been divested of the possession of their property was not proper.

21. CREDITORS' SUITS—*Costs.*—In a creditor's suit to subject to the lien of judgments certain parcels of real estate, a bank, by its counsel, offered proof of a judgment against the judgment debtor, to which counsel for certain other judgment creditors objected, because the bank had refused to contribute anything to the cost of the suit. The master reported the judgment,

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however, and the other judgment creditors excepted to the master's report on the same ground, and the trial court overruled the exception.

Held: That there was no error in the ruling.

22. CREDITORS' SUITS—*Costs.*—The bank offered the proof by counsel of its own selection and could not be required to contribute to the compensation of counsel of appellants. The only other costs to which it could be required to contribute were the legal and taxable costs of the suit. If no property was disclosed in the suit, it was subject to a decree against it for its due proportion of such costs, but as the record discloses abundant property out of which the costs could be made, the question becomes one of no practical importance.

Appeal from a decree of the Circuit Court of Montgomery county.

Affirmed in Part; Reversed in Part.

The opinion of Judge BURKS states the case.

Randolph Harrison, R. E. Scott, Samuel A. Anderson, H. T. Hall, T. W. Miller, C. S. McNulty, M. M. Caldwell, Jackson & Henson, and *H. M. Moomaw,* for the appellants.

Roy B. Smith, Everett Perkins, S. Hamilton Graves, L. H. Cocke, Staples & Cocke, R. I. Roop, and *Woods, Chitwood & Coxe,* for the appellees.

KELLY, J.:

Assuming that the record does not show that the whole of the purchase price of the school property was paid before the appellants' judgments were recovered, we fully concur in the views expressed and the conclusions reached by Judge Burks in regard to the liability of that property. We think further, however, that the record does sufficiently show that the purchase money was all paid before the rendi-

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tion of the judgments, and, hence, that under the doctrine of *Floyd* v. *Harding*, the school property is not liable.

As to the property of the Norfolk and Western Railway Company, we are of opinion that the defense based upon adverse possession is good.

The claim of the railway company to title by adverse possession is decisively supported by all the essential elements of such a title. Its predecessors entered into possession in 1883 under a color and claim distinctly adverse to, and in no wise in privity with, the Rorer title, and this possession, in most emphatic manner, had continued exclusively, uninterruptedly, visibly, notoriously, and in hostility to all other titles, for more than twenty-three years before this suit was brought, and for nearly thirty years before the appellants asserted any claim of lien upon the property, or attempted by amended pleadings to make the railway company a party. During these decades, the adverse occupants had expended many thousands of dollars in permanent improvements on the premises.

One of the distinct defenses of the company, as shown by both answers filed by it, rests upon the claim that its possession under Waid and Terry was adverse and hostile from the beginning and in no way connected with Rorer. In the petition upon which this appeal was granted it is said that, "the lands in the possession of the said railway company * * * were shown to be * * * the property of said Rorer. * * * The said railway company was in possession of the lot conveyed to Rorer by Trout, claiming title thereto by adverse possession * * *" The report of Commissioner Ellett, according to a statement in the petition for appeal, verified by the record, shows "that Rorer's title to the half interest in the lot was good, that he had never conveyed that interest to any one, and that the Norfolk and Western Railway Company was in possession without any title." The report of Commissioner Stuart shows that

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"counsel for the judgment creditors request your commissioner to report especially as to Norfolk and Western office lot that there was no sale of the property by Rorer & Son, or by the said F. Rorer." The decree of the circuit court from which the present appeal was granted contains the following paragraph: "As to the liability of the property conveyed by John Trout and wife to F. Rorer & Son, by deed dated the fifth of May, 1874, and now held and claimed by the defendant, the Norfolk and Western Railway Company, Commissioner Stuart reports that there was no sale or conveyance by F. Rorer of his interest or estate in said property, and that there was no sale or conveyance of said property by F. Rorer, or by F. Rorer & Son, or by F. Rorer and P. H. Rorer, and there being no exception to this finding in said report, said report is in respect thereto confirmed; and the court, now proceeding to pass upon the several defenses of the said Norfolk and Western Railway Company, as presented by its answer and several exceptions to said report, is of opinion that said railway company has held said property for more than fifteen years prior to the institution of this suit adversely to said F. Rorer and those claiming under, by or through him." In the agreed statement of facts it appears that the Roanoke Land and Improvement Company and its successors in title, similarly claiming under the deed from Waid and Terry, continued in the actual, uninterrupted, open, notorious and exclusive possession of said land, *claiming complete title thereto* up to the present time, etc. The fact being conclusively shown that Rorer never parted with his title, this provision in the agreed statement of facts necessarily means that the railway company and its predecessors in title claimed a good and complete title as against Rorer. The cause has been proceeded in from the beginning by the creditors upon the claim and theory that Rorer owned the property and never sold it. This theory was sustained by the commissioners,

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and their finding, without any exception thereto, was confirmed by a solemn adjudication of the court. No error in this respect is or could be assigned by the appellants.

To set out in detail the facts as to the possession of the property and its extensive improvement by the occupants would uselessly prolong this opinion. Suffice it to say that the possession of the railway company, and of those under whom it claims, began before the recovery of the judgments, and that long before this suit was brought it had acquired, by all the tests recognized in the law, as perfect and complete title as it is ever possible to acquire by a true and typical adverse possession.

The important question for decision, therefore, is, What sort of title does adverse possession, in its true legal sense, confer? We think the answer of both reason and authority is that the title thus conferred is good against the world.

The soundness of this conclusion depends, of course, upon the construction and application of section 2915 of the Code. That section, so far as material here, is as follows: "No person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years * * * next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims."

This statute in Virginia, and statutes of substantially the same tenor and effect in the other States, constitute the foundation for all title by adverse possession in this country. The ruling purpose and policy of these statutes, which must be looked to in determining their true meaning and effect, is to give stability to land titles.

"The acquisition of title to land by adverse user is referable to and predicated upon the statutes of limitations in force in the several States, which, in effect, provide that an uninterrupted occupancy of lands by a person who has

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in fact no title thereto, for a certain number of years, shall operate to extinguish the title of the true owner thereto, and vest a right to the premises absolutely in the occupier. The object of these statutes is to quiet the titles to land, and prevent that confusion relative thereto which would necessarily exist if no period was limited within which an entry upon lands could be made; and they are believed to be of even more importance to the interests of society than those relating to personal actions." 2 Wood on Limitations (4th ed.), section 254, page 1219.

"The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate." *Lewis* v. *Marshall* (U. S.), 5 Peters 470, 477, 8 L. Ed. 195, 197.

It is not surprising, therefore, that we should find, as we do find, that, carrying into practical meaning and usefulness, this wise and settled policy and object of the statutes prescribing a limitation to actions for the recovery of lands, the authorities are practically unanimous in ascribing to them the effect of vesting in an adverse occupant who comes within their terms a new, independent and indefeasible title—one paramount to and good against that of all other persons, no matter how or when such other title may have been derived or in what form or forum it may be asserted or sought to be made effective. Less than this would not accomplish the purpose of the legislation.

The adverse occupant who has held for the statutory period does not stand in the position of a grantee from the former true owner, but his occupancy has, by authority of the State speaking through the statute, extinguished all other titles, and has vested in him an absolute and exclusive right to the possession. His title is not in any sense in privity with that of the former owner, and cannot be ques-

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tioned either by such former owner or by any one claiming through him. Some expressions are to be found in the text books and decisions on this subject which, standing alone, might seem to indicate that the adverse occupant merely takes over the title of the former owner. It will usually, if not always, be found, however, that such expressions occur only in a connection which assumes a perfect title in the former owner, and are used only as a means of conveying the idea that adverse possession confers a title complete and perfect for all purposes. For example, if the instant case presented no question of liens, but a controversy directly between Rorer and the railway company, it would be quite natural and appropriate to say that the company's title was as perfect and complete as if it held a deed from Rorer, for the simple reason that this case has been dealt with throughout as if Rorer's original title was perfect. This, however, would be far from saying that the railway company's title was derived from, or in privity with, Rorer. And so, notwithstanding utterances in the books which refer to title by adverse possession as being "as effectual as a conveyance from the owner," "tantamount to a conveyance," "as full and complete as could be conferred by the owner of the fee," and the like, it is considered safe to say, after an exhaustive examination of the authorities, that no substantial support can be found upon which to base any contention that an adverse occupant, in the true legal sense of that term, takes his title in privity with, or subject to any incumbrances or defects created or suffered by, the former owner. It would be a palpable contradiction to say, as the authorities in the main certainly do say, that adverse possession confers *a new and perfect title*, and then to say also that the title thus conferred is liable to be defeated by defects affecting a title formerly held by some other person. No such contradiction in fact exists to any appreciable degree.

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It must be understood that by "adverse possession" we mean a possession which presupposes a disseisin of the rightful occupant, and not a possession under or through the latter. It is true that in a certain sense a grantee of the rightful owner holds the land conveyed to him adversely to all the world, acknowledging title in no one and being no one's tenant; but his possession is rightful, and there is no outstanding right of action in another upon which the statute can operate. In the instant case, there was a disseisin of the acknowledged rightful owner in 1883, and there was never a time afterwards, until the period of limitation had expired, when the right of action against the disseisor did not exist.

To summarize our conclusions, at the risk of some repetition, which we think is justified by the importance of the question, we are of opinion that the better reason and the clear and unmistakable result of the authorities is to the effect that a true adverse possession for the statutory period confers upon the occupant a new, independent, unincumbered, indefeasible title, a weapon of defense and offense, good alike at law and in equity in all proceedings which call in question its validity or endanger its security. In short, such a title, though not derived from the former owner, is as good as it would be possible to acquire by deed from a former owner of a perfect title, or by a grant from the Commonwealth.

"The effect of these statutes generally is, not to transfer the fee to lands from the true owner to the occupier, but to destroy the remedy of the true owner for their recovery by action, and to vest an absolute right to exclusive possession in the occupier as against the true owner and all the world, and a right which is transferable and vests in his grantees a right to the lands as full and complete as could be conferred by the owner of the fee. In a word, it vests in the occupier a title to the premises by possession, which is in

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every respect equal to a conveyance of the fee." 2 Wood on Limitations, section 254, page 1220.

"He (the occupant) has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period." 1 Ruling Case Law, page 690, section 5.

"The title acquired by adverse possession is a title in fee simple, and is as perfect as one by deed from the original owners, or by patent or grant from the government." 1 Cyc. 1135.

"A covenant to convey a perfect title is satisfied by conveying a title acquired under the statute." *Hughes* v. *Graves*, 39 Vt. 359, 94 Am. Dec. 331.

In a copious note on "The Rights and Title Gained Under Adverse Possession," 15 L. R. A. (N. S.) pages 1255, 1257, the annotator says: "An adverse possession which has fulfilled all the legal conditions confers a good title, when completed, upon him who has maintained it. The title has been variously described as a good legal title, valid, perfect, complete, full and complete, a complete investiture of title, a fee-simple title, an indefeasible right, an indefeasible title in fee, equivalent to a grant, and an absolute and perfect title in fee-simple. The language of many of the courts can hardly be made stronger. The authorities in support of the conclusions stated are exceedingly numerous and embrace the courts of practically every jurisdiction in the United States." Citing a multitude of cases both State and Federal.

We refer further to the following authorities, no one of which is cited as covering all of the propositions which we have announced, but which, in the aggregate, will be found to do so fully: 2 Min. Inst. (4th ed.), 577; 2 Min. Real Prop., section 1021; 1 Am. & Eng. Ency. Law (2d ed.), 883; 2 Corpus Juris. 254, and cases cited in notes 81 and 82; *Creekmur* v. *Creekmur*, 75 Va. 430, 435; *Drumright v.*

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Hite, 2 Va. Dec. 465, 26 S. E. 583; *Hollingsworth* v. *Sherman*, 81 Va. 668; *Sherman* v. *Kane*, 86 N. Y. 57, 64; *Bowen* v. *Suander*, 121 Ind. 164; *Parker* v. *Metzger*, 12 Ore. 407, 7 Pac. 518; *Leffingwell* v. *Warren*, 2 Black (U. S.) 599, 17 L. Ed. 261; *Bicknell* v. *Comstock*, 113 U. S. 149, 28 L. Ed. 962, 5 S. Ct. 399; *Campbell* v. *Holt*, 115 U. S. 620, 623, 29 L. Ed. 483, 485, 6 S. Ct. 209; *Sharen* v. *Tucker*, 144 U. S. 533, 36 L. Ed. 535, 12 S. Ct. 720; *Northern P. R. Co.* v. *Ely*, 197 U. S. 1, 7, 49 L. Ed. 639, 641, 25 S. Ct. 302; note to *Menzel* v. *Hinton*, 95 Am. St. Rep. 647, 672. Citations to the same effect as these might be multiplied indefinitely.

We have been referred to no case and we have found none in conflict with the views above indicated. The appellants contend that this is a suit to enforce the lien of a judgment, not an action to recover land; that, therefore, section 2915 of the Code does not apply; and that under sections 3567 and 3571 their lien is valid and enforceable. This contention loses sight of the plain terms and the governing purpose of section 2915, and, if sustained, would largely devitalize that section. It is true that under section 3571 of the Code the lien of a judgment may be indefinitely continued against the land of the judgment debtor in his possession, or of others holding titles derived from and in privity with him. This is forcibly illustrated by our decision to-day in the companion case of *Moomaw* v. *N. & W. Ry. Co.*, *post*, page 782, in which we are enforcing the same judgments involved in the instant case because grantees of Rorer failed, like the vendee in *Flanary* v. *Kane*, to record their deeds. But obviously the same rule cannot be applied to strangers who have acquired a perfect legal title not in privity with but adversely to the title of the judgment debtor. In other words, the life of a judgment may be indefinitely prolonged as to any property upon which it can operate, but whenever the right of the judgment debtor to make an entry on or bring an action to recover any land held adversely is tolled by

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section 2915, the right of his judgment creditor to subject such land to the satisfaction of his judgment also ceases. The lien is a vested right, but surely not more so than the title to which the lien attaches, and when the statute destroys the latter it necessarily destroys the former. A judicial sale of lands to satisfy liens is not a source of title, but merely a transmission of the title sold, and if at the time of the sale such title would not enable the holder thereof to make an entry or maintain an action, the purchaser cannot acquire any right of entry or action. To be sure, section 2915 does not mention judgment creditors or suits to enforce liens, but there is a very good reason why it does not. It was intended to protect the possession of the adverse occupant after the expiration of the limitation period, and, since judgment creditors have only such power to disturb the possession of real estate as they may acquire through the owner, there was no reason for including them in the express words of the statute. The bar of the statute becomes complete after fifteen years from the time a right of action first accrues either to the holder of the particular title in question or to some one through whom he claims. The effect of the statute is to vest a complete title in the occupant whenever the right of action has existed and remained unexercised for the statutory period. This principle is recognized in *Hollingsworth* v. *Sherman* (an action of ejectment), 81 Va. 668, 672, as follows:

"The defendants claim that the period of limitation had long since run, and their title had been perfected by reason of their adverse possession before the suit of the plaintiff was instituted. The plaintiff seeks to excuse her delay in bringing her suit upon the ground that her ancestor conveyed this property to trustees in 1824, to pay debts, and that the debts were only fully paid and the land released by the trustees in 1880, and that, until the release to her, she could not maintain ejectment. Citing *Hopkins* v. *Ward*, in

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this court, reported in 6 Munf. (20 Va.) 38; *Syrus* v. *Allison,* 2 Rob. (41 Va.) 200, 210; *Lincoln* v. *French,* 105 U. S. 614, 26 L. Ed. 1189; *Pratt* v. *Pratt,* 96 U. S. 704, 24 L. Ed. 805, in the Supreme Court of the United States, and *Coulter* v. *Philips,* 20 Pa. 154, and other cases.

"But the question arising in this case is not whether she could sue, or the trustees could sue, to recover the land held under the trust deed. In this case, neither the grantor in the deed, the ultimate *cestuis que trust,* nor the trustee did sue, until the release by the trustee; and if, as claimed by the plaintiff, she could not sue until the release to her, or until the debt was satisfied, it cannot be claimed that the person clothed with the legal title could not maintain ejectment under our statute."

And, so in this case, when the creditors claim that they could not sue because their rights were not invaded and they had no right of action, the answer is, as in the *Hollingsworth Case,* "it cannot be claimed that the person clothed with legal title could not maintain ejectment under our statute."

Theoretically and technically, a suit to enforce a lien is not a suit to recover land, but a practical and rational application of section 2915 of the Code, in the light of its object and purpose and of the authorities to which we have referred, neither requires nor permits us to hold that a lien (which is a mere right to sell a title for debt) stops the statute from running in favor of an adverse occupancy and enables the lienor, by a judicial sale, to infuse life into a title which the statute has annihilated.

The decision in *Flanary* v. *Kane,* 102 Va. 547, 46 S. E. 312, 681, so strongly relied upon by counsel for appellants, is not, in our opinion, in conflict with the conclusions we have announced. Upon the contrary, that case, and the case of *Pratt* v. *Pratt,* 96 U. S. 704, 24 L. Ed. 805, which it follows as authority, will be found upon analysis to furnish

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illuminating illustrations of the true doctrine applicable to the facts of the instant case. Those cases did not involve questions of genuine adverse possession. In *Flanary* v. *Kane*, the defense was sought to be made that the defendants had acquired title against the judgment creditors by adverse possession, but as a matter of fact the possession was not adverse. There was not in that case, as there is here, a conflict of title. The possession, so far as the former owner and his creditors were concerned, was rightful from the beginning. The so-called adverse occupant held and claimed title by, through and under the judgment debtor. The judgments were obtained after he had sold to the predecessors in title of the defendant but before the title bond and deeds under which the defendant claimed were recorded, so that the judgments were, by virtue of the registry acts, which ruled the decision absolutely, given priority over the documentary title. As stated in the opinion, "the right of the judgment creditors to subject the land to the lien of their judgments, recovered after the judgment debtor had parted with his interest therein, resulted from the failure of his vendee to comply with the registry acts." In the instant case no question under the registry acts arises, for the simple reason that the railway company does not claim as a purchaser. The distinction between the two cases is perfectly obvious. In *Flanary* v. *Kane*, the judgment debtor had parted with his title and the occupant was holding under and in privity with it; the possession was rightful and there was no one who had the right to sue for possession. No right to sue having accrued to any one, section 2915 could not operate. The instant case presents exactly the opposite state of facts. The possession of the railway company was not under but against the title of the debtor, Rorer, and there never was a time from the beginning of that adverse possession, until it ripened into a perfect title by limitation, when he did not

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have the right to bring his action. It is interesting to note that, as appears from the briefs which are extant and available, the very able and learned counsel representing the judgment creditors in *Flanary* v. *Kane* conceded that if the defendants had derived their title through sources different from and adverse to the title of the judgment debtor, the defense of adverse possession would have been good.

There are, undoubtedly, passages in the opinion in *Flanary* v. *Kane* which, without the light of the exact facts with which the court was dealing, would support the contention of the appellants. We do not think, however, that the court would have decided *Flanary* v. *Kane* in favor of the judgment creditors if the defendant in that case had held, as the railway company has done in this case, under an adverse title, and if the distinction which we have recognized had been as fully presented as it has been in this case. We do not question the entire correctness of the result in *Flanary* v. *Kane.*

The case of *Pratt* v. *Pratt, supra,* is likewise easily distinguishable from the present case, and illustrates, like *Flanary* v. *Kane,* the difference between a true and a so-called adverse possession. In the *Pratt Case,* a judgment debtor had conveyed land which was subject to the lien of a judgment. After his grantee had been in possession for the statutory period, the judgment creditor brought a suit to enforce the lien. There was a judicial sale and the purchaser brought ejectment against the debtor's grantee. The latter relied upon the statute prescribing a limitation (seven years) to actions for the recovery of land. The United States Supreme Court, after stating the case, said: "It is obvious from this recital that there was no one who could lawfully enter upon the land in the defendant's (judgment debtor's grantee) possession until the plaintiff's judgment lien had become perfected into a legal title by sale and conveyance." And further: "There must be a right of entry

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in some one else to be tolled by this seven years' possession, and the possession must be adverse to this right of entry." And further: "In the case before us, plaintiff sued within five years after his lien became a title. Two of the seven years' possession on which the defendant relies was at a time when the plaintiff had no title and, consequently, no right of action, and while none existed in those from whom he derives title." These quotations from the opinion in *Pratt* v. *Pratt* are quite sufficient to show that the decision in that case was in no way in conflict with the conclusion which we have reached in the instant case.

The same distinguishing principle is affirmatively recognized in *Coulter* v. *Philips*, 20 Pa. 154, 156, cited and relied upon in *Pratt* v. *Pratt*. In that case also the action was ejectment. The plaintiff claimed under a sale to satisfy a judgment lien, and the defendant under a so-called adverse possession. The Supreme Court of Pennsylvania held that the statute of limitations was not available as a defense, but clearly pointed out that if the title of the adverse occupant had not been derived through the judgment debtor then it could not be subject to liens against a title with which it was not in privity. The court said: "A judgment creditor acquires a lien on all the interest that the defendant has in real estate in the county, and the debtor cannot affect it by any conveyance he may make of his estate. * * * A title paramount to the defendant, or twenty-one years' adverse possession by an intruder or stranger to the defendant, may avail to defeat the rights and remedies of a lien creditor. A possession that would bar the debtor would divest the rights of his creditor. But a party coming into possession *under* and *according to* the title of the defendant (the judgment debtor) takes it *cum onere*, and the creditor's relation to the land remains unchanged."

In *LeRoy* v. *Rogers*, 30 Cal. 229, 89 Am. Dec. 88, the material facts were as follows: A man named Leese, who

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held the legal title to land under a patent dated March 2, 1858, executed a mortgage to one Vallejo. The mortgage was judicially foreclosed in 1860 and the land was sold, but the deed was not delivered to the purchaser until 1862. The mortgage constituted merely a lien on the land, and was substantially the same as a judgment. At the date of the issuance of the patent to Leese, one Rogers was in possession of the land, but, as adverse possession does not run against the State, his adverse occupancy did not begin to operate until the State had parted with its title by grant to Leese. As soon as this was done, the possession of Rogers became in a true legal sense adverse to Leese, a right of action at once accruing to the latter, and the statute of limitation (five years) at once beginning to run against that right. In 1864, less than five years from the date on which the purchaser acquired his title under the foreclosure, but more than five years after the statute had commenced to run in favor of Rogers and against Leese, parties claiming under the foreclosure sale brought an action of ejectment against Rogers, who rested his defense upon adverse possession. From this statement, and from the following quotation, it will be seen that this case of *LeRoy* v. *Rogers* involved the question now before us. The opinion of the California court is so directly in point that we quote somewhat fully from it, as follows:

"The plaintiffs raise the point that they are not barred by the lapse of time, because, as they say, their right of action first accrued in 1862, upon the execution of the sheriff's deed in pursuance of the judgment of foreclosure of the mortgage of Leese to Vallejo. We do not find that the point has heretofore been presented to the court, but it is more plausible than real, and its solution is not difficult.

"It will not be contended that a right of action accrues successively to each of the several purchasers of the same parcel of land, in the sense in which that term is used in

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statutes of limitation, as against the person in adverse possession, at the time of the first purchase. Were it so, it would be in the power of any one to avoid the statute by simply conveying the land during the running or after the expiration of the five years. The plaintiffs, to maintain their proposition, must demonstrate that a purchaser at a foreclosure sale comes in under an independent title—that his title is not the title of a mortgagor, but a title that then first sprang into being, or is derived from a title then existing, but that did not confer the right of entry. Where one, possessing only those rights in the land that grow out of prior possession, is ousted after the expiration of five years, he is barred of his recovery; and if he thereafter acquires the title from the general government, it may properly be said that he then acquires an independent title, and that a right of action then accrues to him against the adverse possessor. And the remainderman, upon the expiration of the particular estate, does not come in under it, but claims through an independent source of title, and he has his action though the particular estate may have been cut off from a recovery against the adverse possessor. But such is not the case with the purchaser at the foreclosure sale. His estate in the land is the estate that the mortgagor had, and he is assignee of the mortgagor, in every sense, so far as the title is concerned, that he would have been had the mortgaged premises been conveyed directly by the mortgagor, instead of indirectly and through the operation of a judicial sale. He does not differ in this respect from one who purchases at an official sale, made in satisfaction of a judgment lien."

If the Vallejo mortgage, in the case last cited, had not been foreclosed until 1864, and, instead of an ejectment suit by the purchaser, the case confronting the California court had been a foreclosure suit to which Rogers had been made a party, there can be no doubt that the obvious and sub-

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stantial rights of the parties would have led to the same result as that which was reached in the ejectment suit. Neither can we, in the instant case, permit a suit in equity to take the place of an action at law without applying to the equity suit the statute which was designed to bar the action. That statute, as already pointed out, did not mention equity suits to foreclose liens for the plain reason that they are not appropriate proceedings to try title. Whenever they are so used, the bar of the statute must be recognized. (*Drumright* v. *Hite, supra.*) The statute cannot be nullified by indirection.

The decision in *LeRoy* v. *Rogers* evidently proceeds upon the sound theory that a judicial sale is a mere means of transferring title, and that the application of the statute does not depend upon the form of the creditor's remedy, or upon his right to sue, but depends upon the existence or non-existence, during the statutory period, of a right of action in the title upon which the lien rests.

The decision in *LeRoy* v. *Rogers* also furnishes a convenient answer to the suggestion that adverse possession against a life tenant does not bar an action by the remainderman, and that for a like reason it ought not to bar a creditor, since the adverse possession invades the rights of neither. The remainderman "does not come in under" the particular estate, "but claims through an independent source of title." See also *Pryor* v. *Winter*, 147 Cal. 554, 558, 82 Pac. 202, 109 Am. St. Rep. 162. So, too, an owner of the minerals under a title which has been severed from the title to the surface, is not affected by adverse possession of the surface, because there has been no disseisin as to the minerals, and neither such owner nor any one for him has any right of action against the adverse occupant.

We are not without Virginia authority which seems to us directly in point. In the case of *Virginia & West Virginia Coal Company* v. *Green Charles*, reported in 3 Va. Law Reg.

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(N. S.), at page 492, the effect of a tax lien as against a title by adverse possession is interestingly discussed. The opinion is by Judge Henry C. McDowell, of the District Court for the Western District of Virginia, whose recognized learning, ability, and wide experience at the bar and on the bench with questions involving the land laws of Virginia entitle his views to great respect. He deals with the question as follows:

"Under statutes such as those of this State, the title of the tax purchaser is a derivative title. *McDonald* v. *Hannah*, 51 Fed. 73, 74; *McDonald* v. *Hannah*, 59 Fed. 977, 980. See Blackwell Tax Titles (1st ed.), sections 232-3, page 548: 'Where the law requires the land to be listed in the name of the owner of the fee or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and, in terms or upon a fair construction of the law, permits a sale of the land only when all other remedies have exhausted, then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case *the title is a derivative one*, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment.' If the contention of the plaintiff be upheld, we must construe section 661 as being in conflict with section 2915—the statute of limitation. 'No person shall * * * bring an action to recover any land lying west of the Alleghany mountains but within ten years next after the time at which the right * * * to bring such action shall have first accrued *to himself or to some person through whom he claims*.' But if section 661 be construed as the defendant contends this conflict is avoided, and this

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fact affords a reason of some weight for adopting the construction of section 661 above chosen. 36 Cyc., page 1146; 26 Am. & Eng. Encyc. 616-17-18; Black Interp. Law (1st ed.), page 17, 60-61; 1 Fed. Stats. Ann. XCIII, 31-b; Sutherland Stat. Constr. (1st ed.), section 288.

"Counsel for plaintiff build up a somewhat plausible argument on the decisions holding that the State's lien for taxes is a paramount lien. It is true that Pearson could not have encumbered the land by any lien, even to the suffering of a judgment lien, either before or after the first of January, 1876, which would not have been subordinate to the tax lien and which would not have been extinguished by the tax sale. It is also true that a sale, or devise of the land by Pearson, or a transmission of his title by descent, after the said date could not affect the validity of the tax sale. But it does not follow that the ripening of Ratliff's title by adversary possession is also nullified by the tax sale. The difference is that all such lienors, vendees, devisees or heirs acquire their rights through and under Pearson. Ratliff acquired his right in opposition to Pearson. Any one who acquired a lien on the land from Pearson's predecessors in title, and any one who acquire a lien on or the ownership of the land from or under Pearson, are his privities in title. Ratliff is a stranger to the Pearson title.

"Counsel ask what would have been the result if the tax sale had been held on January 2, 1879. I think the answer is that the State would in such event have offered a wholly worthless tax title for sale. It is perfectly true that, if the Pearson title was in 1876 a valid title, by assessing him with the taxes for that year the State acquired a valid and valuable lien on the land. But there is certainly no Virginia decision, so far as I know, which holds that delay in foreclosing this lien, accompanied by the ripening of an adverse possession of the land by a stranger to the taxpayer, may not make the lien valueless. And I can see no

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reason why the result should be otherwise. If the position I take be sound, it is entirely true that a well advised proposing tax purchaser would not buy at a tax sale, where an adverse title had ripened before the tax sale is held, or will ripen so soon after the tax sale that suit cannot be instituted before the adverse title ripens. And it follows that the tax lien is, or may be, in such case valueless."

The italicized language appearing in the above quotation from Judge McDowell's opinion indicates the weakness in the appellants' position in this case. It is true that here they are seeking to pass the title of Rorer and to try the railway company's title in the same proceeding, thus avoiding an action of ejectment against the latter. It cannot, however, be seriously contended that the substantial rights of the parties can be affected by the form of the procedure. *The purchaser must claim under Rorer,* and must, therefore, come within the plain language of section 2915 of the Code, which, *in terms,* bars an action not only as to the party to whom the right first accrued (Rorer) *but as to those claiming through him.*

We are of opinion, therefore, that the property of the Norfolk and Western Railway Company is entitled to immunity from the lien of the appellant's judgments on the broad ground that a true adverse possession confers a perfect title free from defects created or suffered by the former owner. We have, however, already pointed out that the judgments owned by the appellant were recovered *after* the adverse possession had commenced to run against Rorer. In the light of this fact, there is another and further very strong view of the effect of adverse possession in this case which is forcibly presented by Judge Sims in a separate opinion handed down by him, and in which he concurs in the result arrived at by us; and inasmuch as it is not essential to the decision in this case that we should go further, a majority of the court is of opinion that the decision herein

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should be limited as a precedent to cases in which liens have been obtained subsequent to the beginning of the adverse occupant's claim of title. (See 1 Min. on Real Prop., section 145, page 182.)

The sum and substance of our decision is, that any title to the property claimed by the Norfolk and Western Railway Company which could be acquired by virtue of the lien of the judgments asserted in this suit would be a title held under Rorer; that the right of action to assert such title would be in terms barred by section 2915 of the Code; and that the effect of this section cannot be avoided by resorting to a chancery suit. We have not held that the creditors could not sell the right, title and interest of Rorer himself and pass such rights as he would have to the purchaser at a judicial sale. This could have been done in the instant case either, (1) by originally omitting the Norfolk and Western Railway Company as a party, or (2) by dismissing the cause as to that company when the character of its title was disclosed, or (3) by a decree for sale, subject to the right of the company to assert that title in any action at law by the purchaser at the judicial sale. The appellants have not asked for or desired such a sale. Manifestly it would avail them nothing.

We do not decide the question raised by counsel in the instant case as to whether the railway company can be regarded in the light of the facts as a proper party. There is certainly very respectable authority to support the view that it cannot be so regarded. *Dial* v. *Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Banning* v. *Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Croghan* v. *Spence*, 53 Cal. 15. But while passing this question, we may well suggest that if the railway company had never been made a party, and there had been a judicial sale of the property to satisfy the judgments, the purchaser would necessarily have stood just where Rorer would stand, and could, no more than he, recover

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the premises. Such purchaser, as in *LeRoy* v. *Rogers, supra,* would be powerless in the face of the railway company's adverse possession which has not only extinguished the Rorer title but created and conferred on the defendant company a brand-new and indefeasible one, which cannot be sold for Rorer's debts. See *Va., etc., Co.* v. *Charles, supra.*

Dealing with the case as it is, however, and assuming that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations must be held to protect the adverse claimant if he shows, as the railway company has done in this case, sufficient facts as to the character and duration of his possession. As Judge Riely said in *Drumright* v. *Hite, supra,* "If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum."

We are not at all satisfied that there are not other grounds (two of them discussed by Judge Burks) upon which the decree as to the railway company should be affirmed, but we are content to rest our decision upon the defense of adverse possession.

Except as indicated herein, we concur in all respects in the opinion delivered by Judge Burks.

WHITTLE, P. and PRENTIS, J., concur in the opinion of KELLY, J.

BURKS, J.:

This is a lien creditors' bill filed by several judgment creditors of Ferdinand Rorer, suing for the benefit of themselves and all other lien creditors of the said Rorer who would contribute to the expense of the suit, for the purpose of subjecting his real estate to the payment of the liens

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thereon. The bill was several times amended and supplemented, and various petitions were filed in the case. A number of questions as to procedure were raised, all of which were disposed of on the former hearing of this case. *McClanahan's Adm'r* v. *Norfolk & Western Ry. Co.*, 118 Va. 388, 87 S. E. 731. On that hearing this court, among other things, decided the following points:

(1) An amendment of a lien creditors' bill which sets out in detail other lands bound by the plaintiff's judgments and brings before the court all those who claim to be interested in those lands adversely to the lien creditors, is not a departure from the original bill, and does not make a new case, although it contains some averments not contained in the original bill; and as to lien creditors who subsequently prove their debts in the case, the filing of the bill stops the running of the statute of limitations.

(2) The removal of the judgment debtor from the State is of itself an obstruction to a suit to enforce the judgment, and the statute of limitations does not run against the judgment while the debtor remains out of the State.

(3) A judgment which is a lien on land in the hands of an alienee of a judgment debtor, and which is not barred as against the debtor because of his removal from the State, may be enforced against the lands in the hands of such alienee, although the latter has in no way obstructed the prosecution of the plaintiff's rights. Section 2933 of the Code does not apply to such case.

(4) The doctrine of laches has no application to a suit to subject land in the hands of the judgment debtor or his alienees to the lien of the judgment. The judgment is an express, absolute, statutory lien on the debtor's real estate, and the right to resort to a court of equity to enforce it is a legal right, without terms or conditions, and continues during the life of the judgment.

The correctness of the above propositions cannot now be

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called in question, even if we were disposed to do so, as they have become the law of the case. *Steinman* v. *Clinchfield Coal Corporation*, 121 Va. 611, 93 S. E. 684.

On the former hearing, the cause was heard on an appeal from decrees of the trial court sustaining demurrers to appellants' several bills and petitions, and refusing to hear the cause on the master's report. The demurrers, of course, admitted all facts stated in said bills and petitions that were well pleaded, and the decision on the former hearing was based on such admissions. Facts controverted by the answers were not considered, and as to these the cause is still at large and undecided. Upon the allegations of the bill, admitted by the demurrer, it was held that the Norfolk and Western Railway Company was a proper party to the suit, but upon the facts set up in its answer, no decision was rendered as to the propriety or necessity of making it a party. This court also declined to pass on the report of the commissioner in chancery, but remanded the cause to the trial court where it was declared that the details of the report could be more safely worked out.

When the case was remanded, the trial court refused to pass on exceptions to the commissioner's report, and referred the cause to another commissioner with directions to re-execute the order of reference which had been previously entered in the cause. Under this new reference, the commissioner made a report of the liens against Ferdinand Rorer's estate, and their relative priorities, and of the lands subject to the liens of the judgments proved and the order in which said lands were to be subjected. To this report various exceptions were filed by the landowners, which raised most of the questions to be hereinafter considered. So much of the evidence as is necessary will be stated in connection with the consideration of these various exceptions.

The commissioner to whom the cause was referred re-

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ported numerous judgments against Ferdinand Rorer recovered in the years 1884, 1885 and 1886, and stated the order of their priority. These judgments were all reported as alive and subsisting liens on the real estate of the defendant Rorer. He also reported numerous parcels of real estate liable to the lien of said judgments, and the order of their liability. In the class of unaliened lands, the commissioner placed an undivided one-half interest in a parcel of land containing one acre, which was conveyed to F. Rorer & Son by John Trout and wife, by deed dated May 5, 1874, in the possession of the Norfolk and Western Railway Company, and subsequently known as the Norfolk and Western Railway office building lot. F. Rorer & Son never thereafter conveyed this lot to anyone, and it stands on the records in their names to-day. The next conveyance of this lot of record is a deed from Waid and Terry to the Roanoke Land and Improvement Company, but how, if at all, they acquired title is not disclosed by the records. The chain of conveyances from Waid and Terry to the present owners is complete. With reference to this lot, the commissioner says the Norfolk and Western Railway Company is now in possession of this tract of land, and has been for a number of years, and claims the same by the most notorious acts of adverse possession, exercised by itself and those under whom it claims, as set out in its answer filed in this cause, and as shown by the agreed statement of facts filed before the commissioner, which was returned with his report. The commissioner further states that as the question of whether or not the railway company's adverse possession amounts to a good and sufficient title, is purely a question of law, he does not wish to pass upon it, but respectfully submits it to the judgment of the court.

The Norfolk and Western Railway Company filed sundry exceptions to this report, by which it is sought to set up the following defenses to the judgments asserted against the real estate claimed by it:

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(1) That it had acquired title to the premises by adverse possession, and hence the land was not bound by plaintiff's judgments.

(2) That the land had been conveyed to F. Rorer & Son as a partnership, that it was acquired by the partnership, with partnership funds, for partnership purposes, and hence was personal property and not liable to plaintiffs' judgments.

(3) That prior to the rendition of any of the judgments proved in the cause, the interest of F. Rorer in the lot in controversy had been conveyed to trustees and thereby appropriated to a fund for the payment of all the debts of F. Rorer, and that he had no equity of redemption in such conveyance.

(4) That the complainants were equitably estopped from setting up their judgments against the lot in controversy.

These exceptions of the railway company were sustained by the trial court, and a decree was entered dismissing the case as to the railway company. It is from this decree that the present appeal was taken.

The briefs of counsel filed in this case have presented the case with great ability, and, though they cover upwards of six hundred pages, they have been read with pleasure. The cases cited and discussed in the briefs cannot be reviewed in an opinion of ordinary length, nor do I deem it necessary to review them, as the questions involved can be decided by the application of well established principles.

It is earnestly insisted by the railway company that it has acquired perfect title to the lot in controversy by adverse possession for the statutory period, and that it cannot be deprived of this title by being made a party to a chancery suit to enforce judgments against a defendant under whom the railway company does not claim. In fact, it denies that the railway company is either a necessary or proper party to this suit.

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Disposing of the last question first, I have no doubt that the railway company is a proper party to this suit. If it ever had title by adverse possession, it did not acquire it before 1898. It claims that its predecessor in title entered upon the lot in controversy in the year 1883, and proceeded to make valuable improvements thereon. This claim could not ripen into title until the expiration of the fifteen years required by the statute. Up to the very last day before the expiration of the statutory period, there was no title by adverse possession. The title by adverse possession was acquired only upon the completion of fifteen years of adverse possession. The judgments sought to be enforced in this cause were recovered and docketed in the years 1884, 1885 and 1886. Long after that, if ever, the title of the railway company accrued, and in a suit for the enforcement of liens on the property, the railway company was certainly a proper party, if not a necessary party, as it has been held time and again that it is improper for a court to sell land until the rights of the parties in reference thereto have been ascertained and settled. This could not properly be done without making the railway company a party. *Buchanan* v. *Smith,* 115 Va. 704, 80 S. E. 794; *Woolfolk* v. *Graves,* 113 Va. 182, 69 S. E. 1039, 73 S. E. 721; *Horton* v. *Bond,* 28 Gratt. (69 Va.) 815.

The railway company invokes section 2915 of the Code for its protection. That section, so far as applicable to this case, is as follows:

"No person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years * * * next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims * * *."

It is to be borne in mind that this is not an action to recover land, nor a suit to establish the right of entry. The

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suit of a judgment creditor to enforce his lien against land is not a suit to recover the land itself. It would seem from a mere reading of the statute that it has no application to a case of this kind, and this was the view taken of it by this court in *Flanary* v. *Kane*, 102 Va. 547, 557, 46 S. E. 312, 681, to which further reference will be made later. Section 3567 of the Code declares that every judgment for money rendered in this State "shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment." Section 3571 declares that the lien of this judgment may be enforced in equity, and section 3577 fixes the life of the judgment, or the time during which it may be so enforced. On the former hearing of this case in this court, it was held that the judgments here sought to be enforced were still alive and enforceable, and were not barred by the act of limitations. It would seem plain, therefore, that at the time these judgments were rendered (which were duly docketed), they were liens on whatever estate or interest F. Rorer then had in the lot in controversy which still stood upon the records in the name of F. Rorer & Son. The judgments have not been discharged, and if they were liens on this property at the time of their rendition, they are still liens thereon, unless such liens have in some way been taken away. It is claimed on behalf of the railway company that, if they were ever liens on their property, such liens have been taken away by virtue of the fact of adverse possession of the property by the railway company, and those under whom it claims, for the statutory period. It is further claimed that this adversary possession gives good title against all the world, including the judgment creditors aforesaid. It may be conceded for the purposes of this case that a title acquired by adverse possession is a perfect title, and good against all the world, but it must first be established that such title has been acquired. The statute of

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limitations is generally a mere obstacle placed between a man and the enforcement of a right which he would otherwise enjoy. Remove the obstacle and ordinarily the right will revive, in the absence of statutory regulation. But when title to land has become vested by the statute of limitations, the repeal of the statute cannot divest a title so acquired. *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483. But even as to land, in order that the statute may *begin to run*, there must be an invasion of the rights of another. Adverse possession to constitute title must be such an invasion of the rights of another as will give that other a cause of action, and the latter must fail to institute his action within the time prescribed by the statute in order to confer title on the adverse holder. In other words, he must be negligent in the enforcement of his rights. It is only as to *such persons* that the title so acquired is good, and only when the rights of *all persons* are thus barred is the title perfect. This is illustrated by many cases. Where an estate is given to A for life, with remainder in fee to B, no length of adverse possession against A can bar the rights of B, because his right has at no time been invaded. So also, where there has been a severance of the title between the surface and the underlying minerals, no length of adverse possession of the surface will bar the right of the owner of the minerals. So also, where land is conveyed subject to building restrictions, no length of adverse possession by the occupant who does not violate the restrictions can abrogate the restrictions. This results, not because of the absence of anyone who can sue, but because *the rights of the other party have not been* invaded. *Elys* v. *Wynne*, 22 Gratt. (63 Va.) 224; *Bolling* v. *Teel*, 76 Va. 487; *Interstate Co.* v. *Clintwood Co.*, 105 Va. 574, 54 S. E. 593; *In re Nesbit*, 2 Brit. Rul. Cas. 844, 858-860. See also *Merritt* v. *Hughes*, 36 W. Va. 356, 362, 15 S. E. 56.

The judgment creditor has no interest in the land of his

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debtor. He has neither a *jus in re* nor a *jus ad rem*. He has no right to the possession. He has simply a lien upon the land, and the right to subject it to the discharge of that lien. The duration of that lien is prescribed by statute, and during the time prescribed he may enforce it in equity. The right is given in the most explicit terms, and will not be denied unless taken away by some other statute in equally explicit language. In the case in judgment, there never was a time when the judgment creditors, as such, could have made an entry upon or brought an action to recover the land. They have never claimed the land but only a lien upon it, and nothing done by the railway company has interfered with that right, or given to the judgment creditors any cause of action which they did not previously have. This was substantially held in the case of *Flanary* v. *Kane*, *supra*.

It is ingeniously argued, however, by counsel for the railway company that *Flanary* v. *Kane* is rested upon *Pratt* v. *Pratt*, 96 U. S. 704, 24 L. Ed. 805, which in turn is based in part, at least, upon *Coulter* v. *Philips*, 20 Pa. 154, and that in all these cases the adverse occupant claimed title under the judgment debtor, and that hence *Flanary* v. *Kane* is to be distinguished from the instant case, because the railway company does not claim under, but against, the judgment debtor. It may be conceded for the purposes of this case that *Coulter* v. *Philips*, *supra*, does hold that "a title paramount to the defendant, or twenty years' adverse possession by an intruder or stranger to the defendant may avail to defeat the rights and remedies of a lien creditor. A possession that would bar the debtor would divest the rights of his creditor." It is also a fact that in both *Pratt* v. *Pratt* and *Flanary* v. *Kane*, the adverse holder claimed under, and not against, the judgment debtor. The holding in *Coulter* v. *Philips*, *supra*, however, that a possession that would bar the debtor would divest the rights of

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his creditor, is *obiter*, as no such question was involved in that case; and while *Coulter* v. *Philips* is quoted in *Pratt* v. *Pratt*, and the latter in turn is quoted in *Flanary* v. *Kane*, yet in neither instance was the quotation made for the purpose of approving the doctrine announced in the quotation made from the case of *Coulter* v. *Philips*. The quotation from *Coulter* v. *Philips* in *Pratt* v. *Pratt* is entirely consistent with the views hereinbefore expressed. That quotation is as follows:

"Lien creditors are subject to a limitation of five years; but the statute of limitations that concerns the action of ejectment has no relation to them. They have no estate in the land, no right of entry, no action to be affected by the statute. The statute bars the right of action, and protects the occupant, not for his merit (for he has none), but for the demerit of his antagonist in delaying his action beyond the period assigned for it. *Sailor* v. *Hertzogg*, 2 Parr. 185. But what right of action has a lien creditor to delay? His only remedy is by levy and sale. He then has an estate and a right of entry. The statute may then attach; before, it cannot."

Indeed, the reasoning of Mr. Justice Miller in *Pratt* v. *Pratt* is exactly that contended for by the judgment creditors in this case. Mr. Justice Miller, among other things, says:

"The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to everybody else. He admits no better right in any one. He is no man's tenant. The right by which he holds possession is superior to the right of all others. He asserts this, and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land—a lien which does not interfere with his possession, which cannot disturb it, but which may ripen into a title superior to that under which

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he holds, but which is yet in privity with it. In the just sense of the term, his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run."

It will be observed Mr. Justice Miller says that the lien of the judgment creditor does not interfere with the possession of the adverse claimant, and cannot disturb it, but *this lien may ripen into a title superior to that under which the adverse claimant holds, but which is yet in privity with it,* indicating plainly that when the land is sold for the payment of the judgments, the title acquired by the purchaser will be superior to that of the adverse claimant, and that there is no adverse holding as against the judgment lien until it has become perfected into title by sale and conveyance. The purchaser at the judicial sale will take the interest of all the parties to the suit, including that of the judgment debtor, so far as necessary for the perfection of his title. It is only when the purchaser's right of entry begins that the statute begins to run against him.

In *Flanary* v. *Kane, supra,* Judge Buchanan, in referring to section 2915 of the Code, says: "The statute of limitations invoked has no application to this case." Counsel for the railway company emphasize the word "this" and seek to restrict the decision to cases where the adverse claimant holds under, and not against, the judgment debtor. This construction would seem more plausible if the opinion had closed with that sentence, but the judge goes on to say: "This is clear from the language of that statute, section 2915 of the Code, and of the statute, section 3573, which limits the time within which judgment liens may be enforced in equity."

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Now, there is absolutely nothing in the language of section 2915 to justify the conclusion sought to be drawn therefrom by counsel. It makes no distinction between claimants in privity with, and those holding adversely to, the judgment debtor. There is nothing in the language of the statute which could convey the idea that the opinion intended to embrace one class of claimants, and to exclude another. Then, as if to emphasize the fact that section 2915 of the Code has no application to a suit of a judgment creditor to enforce his lien against land, the judge sets in contrast with that section 3573, of which section he says: "This implies, as has been frequently decided, that as long as the right to issue an execution, or to bring a *scire facias* or action thereon exists, the lien may be enforced in equity." In other words, that section 3573 applies to suits of this character, and not section 2915. Then, as if anticipating that some one might call for a reason for this right of the judgment creditor, he quotes from *Pratt* v. *Pratt, supra,* not for the purpose of approving directly or indirectly *Coulter* v. *Philips, supra,* but to show why the law of possessory actions cannot apply to suits to enforce judgment liens. The quotation is as follows: "The principle on which the statute of limitations is founded is the laches of the plaintiff in neglecting to assert his right. If, having the right of entry or the right of action, he fails to exercise it within the reasonable time fixed by the statute, he shall be barred forever. But this necessarily presupposes the right of entry or the right to bring suit. There can be no laches in failing to bring an action when no right of action exists."

Now, confessedly, the judgment creditor has neither the right of entry upon, nor the right to bring a suit to recover, the lands of the judgment debtor, and because he has no such right, there can be no laches in failing to bring such suit. Indeed, the holding in *Flanary* v. *Kane,* and in this

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case on the former appeal, is to the effect that the equitable doctrine of laches has no application to a suit to subject lands to the lien of a judgment. So long as the creditor's judgment is kept alive, the equitable doctrine of laches will not bar his right to enforce it. He is entirely within his rights when he has docketed his judgment. He may stand by and see his debtor alien the land, or improve it many times its value, as in this case, or see the land occupied by others claiming title thereto, with no loss of his rights, unless some one else has a superior right which he is bound to respect. *Fulkerson* v. *Taylor,* 102 Va. 314, 46 S. E. 309; *Nixdorf* v. *Blount,* 111 Va. 127, 68 S. E. 258; *Flanary* v. *Kane, supra.* If it be said that the title must always reside somewhere, and that the title of Rorer was transferred to the railway company by virtue of the adverse possession, still, no matter how the transfer was made, it was made *cum onere. Parker* v. *Clarkson,* 39 W. Va. 184, 19 S. E. 431. The lien of the judgment is a vested property right, which cannot be taken away from the judgment creditor, and so long as it exists and the judgment is duly docketed, it follows the lands into the hands of whoever acquires them. *Merchants' Bank* v. *Ballou,* 98 Va. 112, 32 S. E. 481.

For these reasons, I am of opinion that the defense of adverse possession to complainants' judgments cannot be sustained.

Although the judgments of the appellants are not barred by statute of limitations, and the adverse holder of land to which the judgments attach cannot make the defense of adverse possession against the lien of such judgments, the question still remains: To what did the lien of the judgments attach? It is well settled in this State that where the recording acts do not interfere, the judgment creditor can never subject any greater interest in the land than the judgment debtor has at the date of the judgment. *Dingus* v. *Minneapolis Imp. Co.,* 98 Va. 737, 37 S. E. 353, and cases

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cited. What interest, therefore, did the judgment debtor, F. Rorer, have in the office property at the date of the judgments proven in this cause?

As hereinbefore stated, F. Rorer & Son were the fee simple owners of this property and never conveyed it to anyone, but in 1882 Waid and Terry conveyed the property to a grantee under whom the railway company claims. The grantee entered into possession, and in 1883 commenced the erection of a large office building upon the property at an expense of about $75,000.00. In 1884, F. Rorer made a general deed of assignment to Cocke and others, trustees, to secure all of his then existing creditors, but giving preferences amongst them. By this deed he conveyed certain specific property to the trustees, and also "all other real estate situate in said city of Roanoke, Virginia, belonging to the said Ferdinand Rorer in law or in equity, in remainder or reversion, or in which he is interested as beneficiary under deeds of trust, or contracts of purchase." This deed also contains the following covenants and stipulations:

"And it is covenanted that the said F. Rorer is hereby permitted and suffered to remain in possession of the property herein conveyed until a sale hereby shall be made as hereinafter provided.

"And it is further covenanted that if the said F. Rorer shall pay off and fully discharge all of the notes, bonds and other indebtedness upon which E. G. McClanahan is endorser or surety * * * and shall pay off and discharge all indebtedness herein secured with all interest thereon, then this deed to be void and the property herein conveyed to be released at the expense of the party of the first part, otherwise the same to remain in full force and effect.

"And if the said F. Rorer shall fail to pay off all of the notes and bonds and other indebtedness upon which E. G.

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McClanahan is endorser or surety and shall fail to pay the other indebtedness herein secured with the interest and cost thereon, by the 1st day of May, 1885, then upon notice to the said trustees by a majority in number of the creditors herein secured, the said trustees shall proceed to sell the property herein conveyed, or so much thereof as may be necessary at public auction at the front door of the court house of the counties in which said property is respectively situated * * * But it is expressly covenanted that in no event shall any property be advertised or any such sale be made at public auction until the 1st day of May, 1885, and then only one-third of the property conveyed shall be sold at that time unless otherwise agreed upon by the parties of the first and second part.

"The remainder of the said property to be sold as follows, to-wit: one-third to be sold on the first day of May, 1886, and the remaining one-third on the first day of May, 1887, unless otherwise agreed upon by the said parties * * * And it is covenanted and agreed that the said F. Rorer is permitted to make sale of any of the property herein conveyed either for cash or for reasonable credit, subject to confirmation by said trustees."

In the following year, 1885, some of the creditors secured filed a bill to set aside this deed on the ground of fraud and inconsistent reservations on the part of the grantor. The bill, however, contained the alternative prayer that, if the deed should be upheld, the court would take charge of the property conveyed and administer the trust. In the meantime, in the years 1884, 1885 and 1886, the appellants who were secured by said deed proceeded to reduce their claims to judgment, which judgments were duly docketed. Such proceedings where had in the above mentioned suit that a number of pieces of property were sold and the proceeds brought into the court and by its orders distributed to the parties entitled thereto. The court referred the case to a

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commissioner to take an account of the debts and their priorities, and also an account of the real property conveyed by the deed. This account was taken and duly confirmed by the court, but no mention is anywhere made of this office property. This case continued on the docket until 1898, when, after having administered all the assets that came into the hands of the court, the court dismissed it from the docket under the five-year rule.

In 1906 the present suit was instituted but no reference was made to this office property in the bill, nor was the railway company made a party defendant until 1912, when it was suggested in the answer of one of the defendants to this suit that the railway company was in possession of property formerly belonging to Rorer, and which had never been conveyed by him. Thereupon, the complainants amended their bill by bringing the railway company into the suit, and asserted a lien on this office property. This was about thirty years after the deed made by Waid and Terry to the predecessor in title of the railway company.

Among other defenses relied upon by the railway company was that of adverse possession, one feature of which we have already discussed. It is not claimed by the appellants that the office property in controversy did not pass by the deed of trust aforesaid, but their claim is that the deed of trust was but a conveyance to secure creditors with the right of redemption in the grantor, and that their judgments constitute liens on the defendant's equity of redemption.

It is insisted, however, that there was no equity of redemption in the office property because (1) the deed of trust parted with all interests that Rorer had in the property and created a trust fund out of which his debts were to be paid, and (2) that if he had any equity of redemption it was what remained after discharging the debts secured by the deed of trust, and that, as the debts evi-

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denced by the judgments of the appellants were secured by the deed of trust, the payment of the debts would *ipso facto* discharge the judgments, and hence there was nothing left in Rorer in the way of an equity of redemption which could be subjected to the payment of the judgments.

Whether or not the deed amounted to an assignment creating such trust fund, or was merely a mortgage, is in a large measure a question of intention to be determined from the language of the instrument itself. *Hoffman* v. *Mackall*, 5 Ohio St. 124, 131. Without going into detail on this subject, I may say that the powers reserved by Rorer in the deed, the provision for the avoidance of the deed upon the payment of the debts, and the limit upon the powers conferred to sell only so much of the property as might be necessary, and various other provisions thereof, lead me to the conclusion that the deed was intended as a deed of trust to secure debts, and was not an assignment.

Assuming that the office property passed under the deed of trust to Cocke and others, trustees—and the case has been argued upon that assumption by counsel on both sides—and that the railway company acquired title by adverse possession as against said deed of trust, what rights, if any, have the appellants by virtue of their judgments? After the recovery of the judgments, appellants had two securities for their debts, one the deed of trust aforesaid, which was a specific lien on the property therein conveyed, and the other their judgments, which were general liens on the real estate of the judgment debtor. These judgments constituted liens on whatever interest Rorer had in the property. It is insisted that Rorer's interest in the property consisted of a mere equity of redemption in the property, and that the discharge of the debts secured automatically discharged the judgments which had been recovered on these debts. The debts secured by the deed were not paid nor released, nor were they, in any true sense of

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the term, discharged. The security furnished by the deed of trust was simply barred by the act of limitation. That is all. The security furnished by the judgments, however, is not barred, and may still be enforced if there is anything upon which it can operate. As the deed of trust was a mere security for the debts therein mentioned, it is clear that F. Rorer had an equity of redemption in the property conveyed, and as long ago as 1737 Lord Hardwicke laid down the doctrine, now well established, that an equity of redemption in real property is *an estate in the land,* and our statute declares that a judgment shall be a lien "on all the real estate of or to which such person is or becomes possessed, or entitled at or after the date of such judgment." Code, section 3567. That a judgment is a lien on an equity of redemption, was held by this court in *Michaux* v. *Brown,* 10 Gratt. (51 Va.) 612; *Hale* v. *Horne,* 21 Gratt. (62 Va.) 112.

Prior to the execution of this deed of trust, Rorer stood upon the record as the fee simple owner of this property, and after its execution he was still the fee simple owner, subject to the encumbrance created by the deed of trust. Whether this encumbrance were removed by the payment of the debts secured, their release, or discharge by act of limitation, or otherwise, is immaterial. If it was actually removed, the property belonged to Rorer discharged of the encumbrance of the deed.

It was necessary for the deed to be accepted by the beneficiaries in order to be effectual. If all of the parties secured repudiated the deed and refused to accept the security provided thereby, Rorer was powerless to force the deed upon them, and they could assert their rights in any way they pleased, and in the instant case, if they had refused to accept the provisions of the deed, the judgments of appellants, which had already attached, could have been enforced at once against the property, discharged of all liability on

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account of the deed. If the limitation to the enforcement of the deed were five years and the appellants chose to let that time elapse so that they could no longer enforce the deed, they could still enforce the lien of their judgment which had already attached to the property. The situation is the same, whether the limitation were five years or twenty. That period having expired, the lien of the judgments which had attached to the property could be enforced. These liens attached, not at the expiration of the period of limitation, but at the date of the recovery of the judgments. From the recovery of the judgments they have been liens on the property until the present time, subject, however, to the prior lien created by the deed of trust, and although this prior lien has become barred by the act of limitations, that does not affect the lien of the judgments. The prior lien has simply ceased to exist. The obstacle placed between the appellants and the right to enforce their judgment against the property has simply been removed, and the right which has existed from the date of the judgments may now be enforced. It often occurs that the evidence of a debt is barred by the act of limitation, but the debt is secured by a pledge or mortgage, and it has been repeatedly held that, although the evidence of the debt may be barred by the act of limitations the pledge or mortgage may be enforced. *United Cigarette M. Co.* v. *Brown*, 119 Va. 813, 89 S. E. 850; *Bowie* v. *Poor Soc.*, 75 Va. 300; *Tunstall* v. *Withers*, 86 Va. 892, 11 S. E. 565; *Roots* v. *Salt Co.*, 27 W. Va. 483; 1 Va. L. Reg. 854. The same principle applies in the instant case, where the creditors held the general lien of their judgments and the specific lien of the deed of trust. The deed of trust cannot be enforced, but the lien of the judgments which has been kept alive may be. Hence, although the defense of the statute of limitations may be good as against the claim under the deed of trust, it is not good or available against the judg-

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ments, and the appellants have the right to enforce said judgments against the office property.

The fact that this piece of property was not discovered while the suit was pending to enforce the deed of trust to Cocke and others, trustees, and hence was not subjected to said deed in that suit, is no bar to the present suit to enforce said judgments. A lien creditors' bill may be filed to subject land to the payment of the judgment liens thereon, and there may be ordered and taken an account of the liens and of the property liable therefor, and it may be subjected to such liens and the case be dismissed from the docket, but this is no bar to a subsequent suit by the same, or other creditors, to subject other lands of the judgment debtor, not discovered during the pendency of the first suit, to the lien of their judgments, if they are still alive. *Callaway* v. *Saunders*, 99 Va. 350, 38 S. E. 182. By analogy it would seem clear that the present suit may be maintained as the judgments are alive and unsatisfied.

The lien of the judgments attached, by force of the statute, at the dates of the judgments, and the complainants are entitled to have enforced in their favor the rights acquired *as of those dates.* They are not here as a matter of grace, but of right. They are in no way appealing to the conscience of the court. One section of the statute gives the lien, and another declares that "jurisdiction to enforce the lien of a judgment shall be in equity." Code, sections 3567 and 3571. The court can impose no conditions, and the equitable doctrine of laches has no application to the case. As the judgments are still alive, as they attached to this piece of property, as they have not been discharged or released, I see no relief that can be extended to the present owners, though the silence of the creditors and their delay in the enforcement of their liens and the resulting disaster to the present owners is such that if the court had any discretion whatever in the premises, it would not

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entertain them for a moment. It is a case in which the courts are unable to afford any relief, but which appeals very strongly to the legislative branch of the government.

The railway company further defends on the ground that the property was purchased with partnership funds for partnership purposes, and is therefore personal property and not bound by appellants' judgments. No evidence of this is offered except the deed itself and the presumption arising from it. On the other hand, it is shown by P. H. Rorer that his interest in the property was purchased with his own funds, and that none of the partnership assets went into it; that the partnership has been settled many years ago, and all the partnership assets divided. Objection, however, is made by the railway company to the testimony of P. H. Rorer on the ground that he is incompetent to testify on account of interest. P. H. Rorer was a member of the firm of F. Rorer & Son, and is a party to this suit and interested in the results as the owner of some of the judgments proven. Section 3345 of the Code removes the disqualification of interest. This section, however, is qualified by section 3346, which declares that where one of the original parties to the transaction which is the subject of investigation is dead or otherwise incapable of testifying, the other party to the transaction shall not be admitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying, except under certain conditions. The transaction which is the subject of investigation is the deed made by John Trout to F. Rorer & Son. All of the parties to this transaction are dead except P. H. Rorer. Trout, the grantor in the deed, has no manner of interest in the question involved, and it is immaterial to those claiming under him whether the property conveyed is declared to be either real or personal property. Nothing that the witness can say can affect him or those who claim under him in any way.

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There are no creditors of the firm of F. Rorer & Son making any complaint or objecting to the testimony, nor is any objection raised by the personal representative of F. Rorer, who is a party to the suit. The testimony offered is not only not adverse to any one claiming under F. Rorer, but, on the contrary, subsequent alienees of F. Rorer unite with the creditors in seeking to hold property of the railway company liable for appellants' judgments. The witness is not offered to prove any fact that is adverse to the interest of either John Trout or F. Rorer or any person claiming under either. The only objection to the testimony of the witness comes from the railway company, which is a third party having no connection whatever with the conveyance from Trout to Rorer & Son, but which, on the contrary, is claiming adversely to Rorer and those who claim under him. As the witness is rendered generally competent by section 3345 of the Code, the objection to his testimony on account of qualifications made by section 3346 must come from some party who is interested in the transaction which is the subject of the investigation. The railway company has no manner of interest in or claim under the deed from John Trout to F. Rorer & Son, which is the transaction under investigation, and hence an exception from that source is not valid. According to the testimony of P. H. Rorer, he and his father were joint tenants of the property and F. Rorer's interest therein is liable to appellants' judgments.

The railway company also sets up the defense of equitable estoppel against appellants' judgments. The only ground of estoppel alleged is that F. Rorer said to the surveyor while plotting this property for the Roanoke Land and Improvement Company, and before it purchased, that he owned no land east of Commerce street, which statement would exclude his ownership of the property in controversy, and notwithstanding this he saw valuable improvements

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being erected on the property and made no assertion of any claim thereto. It further relies upon the fact that McClanahan's administrator, one of the appellants, is now asserting claims then existing against this property, and that McClanahan also lived in Roanoke and was silent as to any claim to the property. It is true that the engineer who made the survey testifies that he spoke to Mr. Rorer at one time and expressed regret at the fact that he did not own any property down at this end of town, so that he could receive some benefit from the improvements that would be made there, and that Rorer told him he did not own any property on the east side of Commerce street. This statement was made apparently in a most casual conversation, and there is no intimation that it was ever communicated to the proposed purchaser of the property, or that it in any way influenced or affected the purchase. The doctrine of equitable estoppel is based upon some act of the party to be estopped upon which the party pleading the estoppel had the right to rely, and did in fact rely, to his prejudice. The evidence fails to show that the railway company or any of its predecessors in title ever relied to their prejudice on anything that was said or done by F. Rorer or P. H. Rorer or E. G. McClanahan, or upon any failure on their part to do anything they ought to have done. For these reasons I think that the appellants are not estopped from asserting their judgments against the property of the railway company.

The appellants also claim that the property known in the record as the "Commerce street school property" is liable to the lien of their judgments. The school board of the city of Roanoke make several defenses to this claim, the chief of which is that their predecessors acquired title under a parol contract of purchase, under which they had acquired a perfect equitable title prior to the rendition of any of the judgments mentioned in appellants' bill. *Floyd* v. *Hard-*

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ing, 28 Gratt. (69 Va.) 401. The purchase was made by the trustees of Big Lick school district, in Roanoke county, which afterwards became incorporated as a part of the city of Roanoke. The property thus passed by operation of law to the school board of the city of Roanoke. The circumstances leading up to and attending the purchase were as follows: In 1876 the school board of Big Lick district in Roanoke county desired to establish a graded school, but did not have the means to do so. F. Rorer owned a lot which they desired to acquire, and which he offered to them upon the following terms: "For $2,500, and take the school house and lot on the hill at $500 in part payment, and the residue in equal payments in one and two years, with interest from date at six per cent. per annum." They canvassed the town of Big Lick for private subscriptions, and obtained good solvent subscribers to the amount of $1,220. The board then accepted Rorer's proposition and issued its bonds for $800, which, together with the house and lot on the hill and the private subscriptions, made up the price agreed. The school trustees took possession of the property thus purchased and a few years thereafter expended $2,000 in adapting it to school purposes. They appear also to have delivered possession of the house and lot on the hill to Rorer. The bonds do not on their face refer to the contract in pursuance of which they were given nor to the minutes of the board, but each of them states that it is for "payment on house and lot bought of F. Rorer for school purposes," and each bears an endorsement dated December 20, 1876, as follows: "For value received I assign the within bond to John B. Harding with permission to indulge until notified in writing to collect. (Signed) F. Rorer." No deed was made by Rorer to the trustees nor by the trustees to Rorer, but the bonds given by the trustees for the deferred payments were paid, and some, if not all, of the private subscriptions were collected and paid over to Rorer.

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In the petition for the appeal it is insisted that the assignment of the bonds and warrants to John B. Harding by F. Rorer, signed by the latter, constitutes a contract in writing between F. Rorer and the school board. The appellants' views are presented as follows: "The bonds and warrants were all payable to Rorer, the vendor, and endorsed by him with his signature. All refer to the property purchased of Rorer for school purposes, and purport to have been executed pursuant to a resolution of the board of trustees, in which resolution, it will be remembered, is set out the full terms of the contract of purchase. Together, then, these papers contain a clear, certain memorandum in writing, signed by the party to be charged, and, in themselves, constitute a contract in writing."

These assignments were for the purpose of transferring choses in action from F. Rorer to Harding, and with no purpose of creating or evidencing a contract with the school board which was not a party to them. The signatures of Rorer were made *diverso intuito*, and together with the warrants and bonds upon which they are made do not constitute a contract in writing between Rorer and the school board, within the meaning of our recording acts. *Sutherland* v. *Munsey*, 119 Va. 791, 89 S. E. 882; *Brown* v. *Butler*, 87 Va. 621, 13 S. E. 71; Code, sec. 2465.

There has been much discussion in this case as to who has the burden of showing that the contract was by parol, but, assuming that the burden of proof is upon the trustees, I concur with Commissioner Stuart in his finding that the evidence shows that the contract was a parol one. It is true that the law favors written evidence of such contracts, and in doubtful cases will presume that the contract was in writing. *McLin* v. *Richmond*, 114 Va. 244, 76 S. E. 301; *Dickenson* v. *Ramsey*, 115 Va. 521, 79 S. E. 1025. It is also true that the statute relating to this class of property requires that the contract shall be in writing, and that the

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evidence of title shall be approved by the circuit court, or judge thereof in vacation. Where, however, the rights of parties are made apparent on the public records, and they have allowed upwards of thirty years to elapse before they have made any investigation of the records to ascertain their rights, and the beneficiaries of the property are represented by trustees who are public officers receiving but little, if any, compensation for their services, and where, after the lapse of many years, all of the parties representing the public interest have died, and the loss of other evidence may have been sustained as incident to the change in office of the trustees, it is not to be expected that those representing the public interest will be able to establish the rights of their beneficiaries by that clear and satisfactory evidence which might be expected and demanded of a private individual looking after his own interest.

It appears from the agreed statement of counsel that a large number of the papers belonging to the school board were found among the effects of Mr. Kefauver, the former clerk of the board. The papers so found represented in large measure vouchers of one kind and another, deeds which had been recorded, and some which had not been recorded, and other papers pertaining to the school affairs. The condition in which the papers were found would seem to indicate that Kefauver had been careful and particular in preserving the papers placed in his custody. It was among these papers that there were found the subscription lists of citizens, the bonds executed for deferred payments on the school house and lot, and various warrants, stub books, etc., and yet no written contract was found among these papers. The records do not show that the assent of the circuit court, or the judge thereof, to the title was ever entered of record, or that he refused to approve the title. No contract was found recorded. No title bond was found of record, nor among Rorer's papers, though it was testi-

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fied by P. H. Rorer that he kept copies of such bonds. In addition to this, the testimony of Ballard, the county superintendent, to the effect that he was careful to have recorded all the contracts and deeds made to the school board, and that he had no recollection of any such contract in writing made by the school board of Big Lick, and other statements by Ballard, all go to confirm the view that the contract was by parol. In addition to this, it would seem from the minutes of the board that Mr. Rorer appeared before the board and made his proposition orally and not in writing, and that the proposition thus made was accepted by resolution of the board. The evidence on this subject as to the nature of the contract was as satisfactory as could be expected under the circumstances of this case, and I think shows that the contract was by parol, and not in writing.

Exception was taken to the introduction of the records of the board, but these records are books of original entry introduced to show the acts of the board with reference to this property, and I think were entirely admissible for that purpose.

It has been argued that the recital in the bond payable eighteen months after date, that it is the "last deferred payment on the school house property," is conclusive of the fact of complete payment of all the purchase money. The recital was at most only *prima facie* evidence of the facts stated, and the evidence in the cause fully meets and repels the *prima facie* presumption that would otherwise arise from the possession of the bond with the endorsement of payment.

The evidence raises a very strong presumption that Rorer was paid in full for the property before any of appellants' judgments were recovered, but this is not sufficient. *Gordon* v. *Rixey*, 76 Va. 694, 697; *Ackerman* v. *Fisher*. 57 Pa. 457.

Without going into the evidence in detail, although I have given it a most careful and critical examination, it is

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sufficient to say that I do not think it shows with the necessary certainty the payment in full to Rorer of the whole of the purchase money agreed to be paid to him for the school house lot, and for this reason it does not appear that the trustees acquired a complete equitable title before the appellants' judgments were obtained.

In 1876 when this purchase was made, however, there was in force an act of assembly relating to the purchase of land by school boards, which is as follows:

"Be it enacted by the General Assembly of Virginia, That whenever it shall be necessary for any county, city, overseers of the poor, district school trustees, or other public officers to purchase real estate, or acquire title to any property for public uses, the contract therefor must be in writing, and the evidence of title must be submitted to the county court, or to the judge thereof, in vacation, for confirmation and approval, which confirmation or approval must be entered of record by the clerk of the court. And no contract shall be valid until the title to such real estate is thus approved or confirmed; and if said court or judge refuse to confirm or approve the same, the disapproval shall also be recorded.

"2. The supervisors of the county or corporate authorities of any city or town, or any five citizens may, by motion, appeal, of right, from the decision of the county court or judge thereof, to the circuit court, where the appeal shall be tried without pleadings, and be decided on the merits of the case." (Acts 1874-5, p. 190.)

It is insisted with great earnestness and ability by the learned counsel for the complainants, that as this contract was not in writing and as the evidence of the title was not submitted to the court or judge, as required by the act, the school board was not bound by it, and hence there was a lack of mutuality of right and obligation, and that, where this is lacking when the contract is entered into, no sub-

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sequent act or omission of the parties can supply its place. It must be borne in mind that this is not a suit upon that contract, nor for its enforcement. The school board acquired the equitable title to the property thirty years before this suit was brought, and the legal title at least five years before they were made parties thereto. They are in possession with both the legal and equitable title and all they ask is to be let alone. The judgments of the complainants, if they attached at all to the property, attached as of their date, and they claim that they did so attach, and they are seeking in this suit to enforce those liens. It is necessary, therefore, to consider the effect of the statute. It is manifest from the language of the statute that it was not enacted for the benefit of vendors of land, but to prevent the loss of public funds by investment in property the title to which was defective. It is true that it declares that the contract shall not be valid unless and until the title to the land "be thus approved," but this does not necessarily mean that the contract shall be void. The Massachusetts statute of frauds contains language very similar to the statute under consideration. It declares that contracts within the statute shall not be held to be "good and valid" unless they are in writing, and, in construing this statute the court held that it was not the intention of the legislature to declare such contracts void, but simply to prevent oral proof. *Townsend* v. *Hargraves*, 118 Mass. 325. The relation of the parties to this contract is strongly assimilated to the relation of parties to a contract within the statute of frauds which has been signed by only one of them. There is no lack of mutuality in the contract, but in the formality of the evidence of it. The school board had full power to buy the lot for the school house, the county school board approved the sale to Rorer of the lot on the hill, and the agreement with Rorer possessed every element of a valid contract save the failure to comply with the statute enacted for its bene-

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fit. The statute, like the statute of frauds, does not go to the existence of the contract, but makes written evidence necessary to evidence it. Moreover, like the statute of frauds, the right to demand compliance with the statute is a matter personal to the parties to the contract and their privies, and cannot be insisted upon by third persons. Clark on Contracts (2d ed.), pp. 91, 96; *Cahill* v. *Bigelow*, 18 Pick. (Mass.) 369; *Glenn* v. *Rogers*, 3 Md. 312; Brown on Stat. Frauds, secs. 128, 135.

The lack of mutuality in the obligation of a contract, growing out of the failure of one of the parties to a contract within the statute of frauds to sign it, is no objection to the binding effect of the contract. It is one of the well defined exceptions to the general rule requiring mutuality. In Pomeroy on Contracts, sec. 170, it is said: "The second general exception to the requirement of mutuality includes all those agreements which, by the provision of the statute of frauds, must be in writing, and which, in conformity with the overwhelming weight of judicial authority, need only to be signed by the party to be charged, that is, by the defendant in the suit brought upon the contract."

In *Central Land Co.* v. *Johnston*, 95 Va. 223, 28 S. E. 175, it was held that specific performance of a contract for the sale of real estate will be decreed against the party who signed the contract, although the other party did not sign, and there was no mutuality of remedies between the parties at the time the contract was made. The filing of the bill by the other party for specific performance makes the remedy and the obligation of the contract mutual.

As parol contracts for the sale of land were valid in 1876, by parity of reasoning to cases arising under the statute of frauds, the fact that the contract was not in writing and the title to the land was not approved by the court or judge, furnishes no valid reason why the contract may not be enforced, in a proper case, against Rorer, who labored under no disability to contract.

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The situation was as follows: Rorer and the school board had entered into a parol contract in September, 1876, for the exchange of property. Under the terms of the exchange Rorer was to take the "lot on the hill" at $500; the school board were to have the "grove" property and were to pay Rorer $2,000 additional, of which $800 was to be paid by warrants out of school funds, and $1,200 out of funds raised by subscriptions from the citizens. Rorer had received possession of the "lot on the hill" and as far back as 1882 this lot had been conveyed by John Trout to a purchaser. The school trustees had paid the $800 and certainly a considerable amount of that subscribed by the citizens. The "grove" property had been changed from a residence into a school house, and $2,000 had been expended in making the change. After this, the complainants obtained their judgments. The agreement between the parties was certain and definite in its terms. The acts done in part performance of the contract referred to, resulted from, and were done in pursuance of the agreement, and the agreement itself had been so far executed that a refusal of full execution would have operated a fraud upon the trustees and placed them in a situation which does not lie in compensation. The contract for this exchange of property was fair in every respect, but being by parol, it could not be recorded. The trustees were in no default except perhaps they owed a balance of the purchase money. It was impossible, if the contract had been rescinded, for the parties to be placed *in statu quo ante.* The "lot on the hill" which was received by Rorer had been sold and conveyed to a third party. The school property had been utterly changed, and the situation was such that, if the contract was valid and enforceable, upon tender of the balance due to Rorer, if any, a court of equity would have compelled him to make a deed, and he, on his part, had acquired a complete equitable title to the "lot on the hill." If the contract was valid each party was in a position to de-

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mand specific performance—Rorer without condition; the school trustees on tender of the balance due, if any. Such was the situation of the parties before the rights of the creditors intervened. The rights of the parties to this contract were plainly established, and third persons could not thereafter come in and disturb the rights thus vested.

The oldest judgment proven in the cause was recovered in 1884, eight years after the sale to the school trustees, and after the happening of the events hereinbefore detailed. From that time till 1911 not one step was taken by these creditors to subject this property to the payment of their judgments. The judgments had apparently become barred by the statute of limitations, but were kept alive, not by the diligence of the creditors, but by the accidental circumstance that Rorer left the State and continued to reside out of the State until 1906, when he died. In the meantime, the property had been improved by the erection thereon of a school building costing upwards of $20,000, and the land had otherwise greatly enhanced in value. Rorer, also, in pursuance of the legal and moral obligation resting upon him, had conveyed the legal title of the property to the school board. All of this transpired before this suit was brought, and not until five years after it was brought were the trustees made parties defendant to this suit. In order to defeat these rights and equities of the school board, the complainants invoke the statute aforesaid, to show a want of mutuality in the contract and a consequent right on their part to subject the property in its present state to the payment of their judgments. To permit them to do so would be to perpetrate a fraud upon the trustees, and to turn a statute which was intended as a shield to protect the improvident expenditure of public funds into a sword of offense. I cannot assent to that proposition. As I have heretofore stated that I did not think that the evidence showed with the necessary clearness required by law, that

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the whole of the purchase money had been paid at the time complainants' judgments were recovered, it remains to be considered "to what extent, if at all, can appellants subject said property?"

It has been earnestly insisted by counsel for the school board that equity considers that as done which ought to have been done, and that immediately upon the execution of a valid contract for the sale of land, the purchaser is considered in equity as the owner of the land and the vendor the owner of the purchase money, and hence complainants' judgments never attached to this property, as the contract was entered into before any of their judgments were recovered. Many authorities are cited to support the doctrine of equitable conversion, but none which are applicable to a case of this kind. The judgments are statutory, legal liens and attach to the legal ownership of the land, but equity limits the liability to the extent of the beneficial interest of such owner. At the time of the recovery of the judgments Rorer was at law the fee simple owner of the property, and to this the lien of the judgments attached, but, in consequence of the contract of sale, equity will restrict the lien creditors in the enforcement of their liens to the amount owing by the school board to Rorer, at the date of the recovery of the judgments.

In *Borst* v. *Nalle,* 28 Gratt. (69 Va.) at page 433, it is said: "Authorities without number might be cited to show that where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor really owns, and to this he will be confined, as he should be, by courts of equity. In support of this proposition the following apposite authorities are cited by the appellant's counsel. *White* v. *Carpenter,* 2 Paige (N. Y.) 217, 238, 266-7; *Keirsted* v. *Avery,* 4 Paige (N. Y.) 9; *Buchan* v. *Sumner,* 2 Barb. Ch. (N. Y.) 165, 207; *Lownsbury* v. *Purdy,* 11 Barb. (N. Y.) 490; *Towsley* v. *McDonald,* 32

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Barb. (N. Y.) 604; *Sieman* v. *Austin*, 33 Barb. (N. Y.) 9; *Siemon* v. *Schurck*, 29 N. Y. 598; *Smith* v. *Gage*, 41 Barb. (N. Y.) 60, 71-75; *Schlaeper* v. *Corson*, 52 Barb. (N. Y.) 510; *Robinson* v. *Robinson*, 22 Iowa 427; *Thomas* v. *Kennedy*, 24 Iowa 397; *Brown* v. *Pierce*, 7 Wall. (U. S.) 205, 218, 19 L. Ed. 134; *Baker* v. *Morton*, 12 Wall. (U. S.) 150, 20 L. Ed. 262.

Many cases have been since decided in this and other courts holding the same proposition. Indeed, it cannot be gainsaid. One of the latest in this State is *Straley* v. *Esser*, 117 Va. 135, 83 S. E. 1075.

Furthermore, it is the beneficial interest and only the beneficial interest of the judgment debtor that his creditor can subject. *Straley* v. *Esser*, *supra*. As there are no statutory provisions to interfere in this case, the creditor is in a sense substituted to the rights of his judgment debtor, and cannot subject the property standing in the name of the judgment debtor to any greater extent than is measured by the beneficial interest of the debtor in the property. It is true the debtor holds the legal title to the land, but he holds it in trust for the benefit of the purchaser to be conveyed to him upon payment of the balance of the purchase money, and upon tender or payment of that amount he would be compelled to convey the legal title. The balance due on the purchase price is the measure of the debtor's beneficial interest in the property, and such is the measure and extent to which the judgment creditor can subject it.

I am not unmindful of the fact that this holding is in conflict with the conclusion reached by this court in *Fulkerson* v. *Taylor*, 102 Va. 314, 46 S. E. 309. That case was decided by a court of very able judges, and the opinion was delivered by one of the most distinguished judges who ever sat upon this bench. But the reasons upon which the conclusion was reached are not stated in the opinion. In the opinion it is said: "If it be true, as insisted by counsel for

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Wheeler's heirs, that his contract of purchase from Fulkerson was in parol; that Wheeler had been put in possession under it, and paid part of the purchase price before the Baylor judgment was rendered and docketed—it does not, to the extent of such payment, give them priority over the lien of the Baylor judgment. In order for a purchaser, under a contract which is not required to be recorded, to be protected as to subsequent judgments against his vendor, he must, before the date of such judgment, have become invested with a perfect equitable title. *Withers* v. *Carter*, 4 Gratt. (45 Va.) 407, 412, 50 Am. Dec. 78; *Floyd, etc.* v. *Harding*, 28 Gratt. (69 Va.) 401, 414, 416; *March, Price & Co.* v. *Chambers*, 30 Gratt. (71 Va.) 299, at page 303; *Long* v. *Hagerstown Agricultural Co.*, 30 Gratt. (71 Va.) 665; *Brown* v. *Butler*, 87 Va. 621, 13 S. E. 71; *Powell* v. *Bell's Adm'r*, 81 Va. 222. Wheeler did not have at that time a perfect equitable title, as he had only paid a part of the purchase price."

All of the cases cited belong to one or the other of two classes. Either there was a valid contract which had been completely performed and the purchaser was entitled to call for a deed, or else there was a written contract which the statute declared void because it was not recorded. In the first class the property was held not liable to judgments against the vendor. In the second class, the property was held liable. In *Withers* v. *Carter, supra*, there was a written contract, but, as the law then stood, it was valid, though not recorded. The purchaser, however, had fully complied with his contract and was entitled to call for a deed, though he still owed a balance of the purchase money. This balance, at his instance, was subjected to the payment of the judgments against his vendor. I do not think that it follows as a logical deduction that because there is no liability on the land when the equitable title of the purchaser is complete, the whole land, with all the improvements put there-

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on, is liable when the equitable title of the purchaser is incomplete. On the contrary, it would seem that, upon like reasoning, if the equitable title were not complete, the creditors of the vendor would still be restricted to the rights or interest of the vendor in the land, and that they could only subject it *pro tanto*. If the creditor can get nothing when all of the purchase money has been paid, it would seem that when only a part has been paid and the parties cannot be placed *in statu quo ante*, the creditor should be restricted to the interest of the debtor represented by what was due to him and which was secured by a lien on the land. The creditor ought not to be allowed to acquire any higher or greater rights than the debtor himself has, and such seems to be the result of the authorities. Where a valid contract for the sale of land has been entered into, and the recording acts do not interfere, a judgment against the vendor after the contract and before deed to the purchaser, and before the entire purchase money has been paid, is a lien on the land only to the extent of the purchase money then unpaid. This, we think, is a fair deduction from *Withers* v. *Carter, supra; Floyd* v. *Harding, supra,* and *Borst* v. *Nalle, supra.* In *Bowman* v. *Hicks,* 80 Va. 806, possession was taken under a valid parol contract, but *only a part of the purchase money* had been paid, when a judgment creditor of the vendor sought to subject the land to the payment of his judgment. It was held that he could not subject the land "except to the payment of the unpaid purchase money."

In West Virginia, whose laws are like our own, Judge Green whose opinions are always luminous, in discussing this subject in *Snyder* v. *Martin,* 17 W. Va. 276, at p. 298, says: "The principal question presented by this record is, whether a parol contract, so far executed as to entitle the purchaser to a specific execution of the contract, is good against a subsequent judgment creditor. Independent of any statute law, the lien of a judgment is a charge upon

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the precise interest which the judgment debtor has, and upon no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall encumber any greater or less interest than the debtor *in fact* possesses. The judgment creditor has a charge on the interests of the defendant in the land, just as they stood at the moment the lien attached, therefore though he seems to have an interest, yet if he have none in fact, no lien can attach. The rights of the judgment lien owner cannot exceed those which he might acquire by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons. The attaching of a judgment lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property. The judgment lien is in equity but a charge on the equity held by the defendant, where the lien attaches. It can only hold the legal estate subject to the equity. It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor. The lien of the judgment creates a preference over subsequently acquired rights, but a court of equity will always protect the equitable rights of third persons existing at the time the judgment lien attached. See Freeman on Judgments, pp. 309, 310 and 311, secs. 356. 357; *Churchill* v. *Morse*, 23 Ia. 229, 92 Am. Dec. 422; *O'Rourke* v. *O'Conner*, 30 Cal. 442; *Coster's Ex'r* v. *Bank of Georgia*, 24 Ala. 37, 64; *Walke* v. *Moody*, 65 N. C. 599; *Ells* v. *Tousley*, 1 Paige (N. Y.) 280; *Morris* v. *Mowatt*, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Brown* v. *Pierce*, 7 Wall. (U. S.) 205, 19 L. Ed. 134."

After giving numerous illustrations, he proceeds: "It may therefore, be laid down as a universal rule established by many cases, that a judgment lien is always subject to

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every possible description of equity held by a third party against the debtor at the time the judgment lien attached; and that it is immaterial, whether the rights of such third party consist of an equitable estate or interest in the judgment debtor's land, an equitable lien on his land, or a mere equity against the debtor which attaches to or affects his land. Nor is it at all material whether the judgment debtor has or has not, when he contracted his debt or obtained his judgment or docketed the same, notice of such equitable estate, equitable lien, or mere equity. If they be prior in time to the judgment, they will always be preferred to the judgment lien. The authorities we have cited abundantly sustain this conclusion; and there is no exception to this universal rule, except where such exception has been made by some statute law.

"Unquestionably, therefore, a purchaser of land by parol contract, to the full extent that a court of equity would recognize his equity against the party who by parol contract had agreed to sell him the land, should be held in a court of equity to have rights superior to any subsequent judgment creditor, whether the judgment creditor had or had not notice of his contract to purchase the land, unless some statute law has rendered the judgment creditor's lien superior to his equity."

In *Filley* v. *Duncan*, 1 Neb. 134, 93 Am. Dec. 337, it is said to be "well settled that in equity the lien of a judgment is subject to all equities that existed at the time it was recovered;" and in *Dalrymple* v. *Security Company*, 11 N. D. 65, 88 N. W. 1033, 1036, it is said to be well settled "that the lien of a judgment attaching to real estate after a contract of sale extends only to the interests of the vendor, and is entirely subject to the contract of sale."

In *Hays* v. *Reger*, 102 Ind. 524, 1 N. E. 386, it is said: "The interest which the lien of a judgment affects is the actual interest which the debtor has in the property, and

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a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or is not real, and when the judgment debtor has no other interest except the naked legal title, the lien of a judgment does not attach."

To the same effect see *Straley* v. *Esser, supra.*

In *Wells* v. *Baldwin,* 28 Minn. 408, 410, 10 N. W. 427, speaking of the purchaser at a sheriff's sale under a judgment, it is said: "In other words, the purchaser at such sale would be entitled to the same rights as the vendor in the contract had, and would be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey."

To the same effect see *Hampson* v. *Edelen,* 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Woodward* v. *Dean,* 46 Ia. 499; *Berryhill* v. *Potter,* 42 Minn. 279, 44 N. W. 251; *McMullen* v. *Wenner,* 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543, 546; *Minns* v. *Morse,* 15 Ohio 568, 45 Am. Dec. 590. For a collection of authorities on the subject see 23 Cyc. 1373, 17 Am. & Eng. Ency. Law (2d Ed.) 780; 1 Black on Judgments 438, Freeman on Judgments, secs. 355, 356.

In a note by Freeman to *Filley* v. *Duncan,* in 1 Neb. 134, 93 Am. Dec. 357, this subject is fully discussed and a number of authorities are cited. In order to show not merely the views of Mr. Freeman, but the great number of cases supporting his conclusion, the following extract is made from that note:

"*Attaches to actual, not apparent, interest of judgment debtor.*—The lien of a judgment attaches to the precise interest of the judgment debtor in the land. In some States it is confined to the legal interest of the debtor; but whether it extends to the legal and equitable interest, or is restricted to the legal interest only, it is the actual and not the apparent interest of the defendant that is affected, and his apparent interest can neither extend nor restrict the

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operation of the lien so that it shall encumber any greater or less interest than the debtor in fact possesses: Freeman on Judgments, sec. 356; *Berkley* v. *Lamb,* 8 Neb. 392, 399, 1 N. W. 320; *Colt* v. *DuBois,* 7 Neb. 391, citing the principal case; *Unknown Heirs* v. *Kimball,* 4 Ind. 546, 58 Am. Dec. 638; *Union Bank* v. *Manard,* 51 Mo. 548; *Sandford* v. *McLean,* 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Ells* v. *Tousley,* 1 Paige (N. Y.) 280; *Morris* v. *Mowatt,* 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Ex parte Trenholm,* 19 S. C. 126; *Blankenship* v. *Douglas,* 26 Tex. 225, 82 Am. Dec. 608; *In re Estes,* 6 Saw. 459. And, therefore, where the judgment is a lien upon equitable interests, it matters not that the evidences of the debtor's interest are not of record: *Lathrop* v. *Brown,* 23 Ia. 40; *Logan* v. *Herbert,* 30 La. Ann. p. 727; *Richter* v. *Selin,* 8 Serg. & R. (Pa.) 425; *Niantic Bank* v. *Dennis,* 37 Ill. 381. And on the other hand, though he seems to have an interest, if he have none in fact no lien will attach: *Churchill* v. *Morse,* 23 Ia. 229, 92 Am. Dec. 422; *Uhl* v. *May,* 5 Neb. 157; *Holden* v. *Garrett,* 23 Kan. 98; *Lombard* v. *Abbey,* 73 Ill. 177; *Doswell* v. *Adler,* 28 Ark. 82; Freeman on Judgments, sec. 357; for the lien can extend no further than the debtor has power voluntarily to transfer or alienate the lands in satisfaction of his debt: *Coombs* v. *Jordan,* 3 Bland (Md.) 284, 22 Am. Dec. 236; and the rights of a lien holder cannot exceed those which might be acquired by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons: *Baker* v. *Morton,* 12 Wall. (U. S.) 150, 20 L. Ed. 262.

"*Lien Subject to Equities of Third Persons.*—And, therefore, a judgment lien on the land of the debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and courts of equity will protect such equities against the legal lien, and will limit that lien to the actual

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interest which the judgment debtor has in the estate: *Blankenship* v. *Douglas,* 26 Tex. 225, 82 Am. Dec. 608, and note 612, 613; *Coombs* v. *Jordan,* 3 Bland (Md.) 284, 22 Am. Dec. 236; *Sweet* v. *Jacocks,* 6 Paige (N. Y.) 355, 31 Am. Dec. 252; *Buchan* v. *Sumner,* 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Coster's Ex'r* v. *Bank of Georgia,* 24 Ala. 37, 64; *Wharton* v. *Wilson,* 60 Ind. 591; *Ells* v. *Tousley,* 1 Paige (N. Y.) 280; *Morris* v. *Mowatt,* 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Walke* v. *Moody,* 65 N. C. 599; *Frazer* v. *Thatcher,* 49 Tex. 26; *Floyd* v. *Harding,* 28 Gratt. (69 Va.) 401; *Goodell* v. *Blumer,* 41 Wis. 436; *Brown* v. *Pierce,* 7 Wall. (U. S.) 205, 19 L. Ed. 134; *Whitworth* v. *Gaugain,* 1 Philips 728; *Burgh* v. *Francis,* 3 Swanst. 536, note; *Finch* v. *Earl of Winchelsea,* 1 P. Wms. 277."

If the doctrine announced in *Fulkerson* v. *Taylor, supra,* were adhered to in the present case, the result would be that if the purchasers owed only one dollar of the purchase money the creditors could come in and subject property which originally cost $2,500 and is now worth probably $50,000 to the extent of its full value.

In the face of such an array of authority supported by such satisfactory reasons, I am unable to concur in so much of the opinion in *Fulkerson* v. *Taylor, supra,* as declares that "in order for a purchaser under a contract which is not required to be recorded, to be protected as to subsequent judgments against his vendor, he must, before the date of such judgment, have become invested with a perfect equitable title," by the payment of the whole of the purchase money.

It is true, as stated in *Fulkerson* v. *Taylor, supra,* that the highly equitable provision of section 2472 of the Code has no application to judgment creditors. It does not purport to deal with judgment creditors, nor can we perceive any good reason why it should. The revisors recommend-

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ed, and the legislature adopted, the provision for the protection of purchasers because it was necessary to do so, but made no reference to the liability of lands in the hands of the equitable owner to judgments against his vendor, because it was unnecessary to do so. As stated in *Fulkerson* v. *Taylor, supra,* "prior to the Code of 1887, a subsequent purchaser under a contract not required to be recorded was not protected against a prior unrecorded conveyance unless he had paid the whole purchase price before he received notice of the unrecorded conveyance." This was regarded as a hardship, but it could only be corrected by legislation, and hence the provision of section 2472 of the Code. But neither prior nor subsequent to the Code of 1887 did any such hardship exist as to the equitable owner of real estate. Both before and since the revision of 1887, it has been held that where the recording acts do not interfere the judgment creditor can acquire no better right to the estate than the debtor himself has at the date of the recovery of the judgment. *Floyd* v. *Harding,* 28 Gratt. (69 Va.) 401, 407; *Dingus* v. *Minneapolis Imp. Co.,* 98 Va. 737, 37 S. E. 353.

The equitable owner, therefore, was suffering no hardship which it was necessary or proper for the legislature to remove. The recording acts did not interfere because he was claiming under a contract admitted to be valid, and which could not be recorded, because it was by parol. The extent of the liability for judgments against his vendor was measured by the interest of the vendor, as between him and his vendee, and that was the balance due on the land at the date of the judgment against his vendor. For this he was already bound and it was immaterial to him whether he paid it to his vendor, or to the vendor's creditor. He was, therefore, already amply protected and there was no necessity for any statute on the subject. His contract was valid, the recording acts did not interfere, and

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his liability was limited to the balance owing on the purchase price. What more could he expect or desire?

After a purchaser of land has put his deed to record he is not required to watch the records to ascertain whether thereafter other deeds by his grantor or judgments against him are docketed or recorded, and the same is true of deeds of trust conveying the land. The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered. *Bridgewater Roller Mills Co.* v. *Strough,* 98 Va. 721, 37 S. E. 290. It is said in Sheldon on Subrogation, section 80, that "a mortgagee is not bound to take notice of subsequent liens or conveyances, or of litigation which arises concerning them; and subsequent purchasers of portions of the mortgaged premises who desire to act with reference to the order of subsequent alienations by the mortgagor must notify him of the fact in proper time and request him to act accordingly. * * * If a release of a part of the mortgaged premises was given without notice of the equities of the subsequent encumbrancer or grantee, the first mortgagee who gave it is not responsible for the consequences of his act, nor is the lien of his mortgage upon the unreleased portion of the premises in any wise impaired thereby." The same principle has been applied to the docketing of judgments against the former owner of land who has made a valid contract for the sale thereof, where the purchaser is in open and notorious possession of the land, but has not yet received a deed. In *Moyer* v. *Hinman,* 13 N. Y. 180, Judge Denio said: "I consider it equally well settled that the docketing of a judgment against the vendor affords no notice of its existence either actual or constructive, to the prior vendee of the judgment debtor." Speaking of payments by the vendee to the vendor after the docketing of judgments against the vendor, he says further: "In the view of a court of equity, his con-

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dition was like that of a party having a prior conveyance or lien which was duly recorded. * * * The vendee having no notice of the judgment creditor's lien, and the creditor having full notice of the vendee's situation, it would seem to be reasonable that, in order to intercept those payments and divert them from the vendor's hands to his own, the creditors ought at least to inform the vendee of the existence of his lien and his right to the unpaid purchase money." To the same effect, see *Parks* v. *Jackson*, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; *Hampson* v. *Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Filley* v. *Duncan*, 1 Neb. 134, 93 Am. Dec. 337.

In the instant case, the school trustees were in the most open and notorious possession of the property long before any of the judgments were recovered against Rorer and probably before the debts were incurred by him; the dwelling was changed at an expense of $2,000 to a school building; a graded school was conducted there continuously until it was incorporated into the city; thereafter Rorer conveyed the legal title to the city school board, reciting in his deed that all the purchase money had been paid, and the city erected thereon a handsome school building, and so improved the property that what originally cost only $2,500 is now estimated by the appellants to be worth $65,000. All of this transpired without a word of notice from the judgment creditors, so far as the record discloses, until the owners of the property were made defendants to this suit, and it was sought to subject the property to the payment of appellants' judgments. Rorer was under a legal and moral obligation to convey the property to the trustees upon payment of the balance of the purchase money, and the recital in his deed is certainly admissible evidence against him that such payment had been made. The judgment creditors gave no notice of any intention to subject the property to the balance of the purchase money and have

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not taken a single step since the docketing of their judgments until the institution of this suit for the protection of their interests. They allowed thirty years to elapse after the purchase of the property before they instituted their suit—the judgments being kept alive by the absence of the judgment debtor from the State—seeing large expenditures being made by the purchasers, but without one word as to liability for their judgments. Under such circumstances, I am of opinion that the school property is not liable to the judgments sought to be enforced against it. This conclusion renders it unnecessary to pass upon other questions raised in the record in relation to the school property.

It is assigned as error that the trial court refused to appoint a receiver of the property reported as liable for complainants' judgments, or to hold the parties in possession thereof liable for the use and occupation thereof, pending the final determination of this litigation. There was no error in the ruling complained of. The railway company and the school board were, in good faith and upon reasonable grounds, contesting the liability of the property owned by them to the appellants' judgments, and the owners of the other property joined with the appellants in seeking to hold the property of the railway company and the school board liable, because if these properties were held liable they would probably produce sufficient to pay off and discharge appellants' judgments and thereby relieve the property of such owners from any liability for said judgments. The rights of the parties had not been determined at the time the receiver was asked for, nor had it been ascertained and adjudicated what property should be subjected to the discharge of such judgments. In such circumstances, the appointment of a receiver whereby the parties would have been divested of the possession of their property was not proper. It would have taken from the railway company and the school board the possession of property not then

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determined to be liable to complainants' judgments, and turned private persons out of homes that might never have to be resorted to for the satisfaction of such judgments.

In *Norris* v. *Lake*, 89 Va. 513, 518, 16 S. E. 663, it is said: "The appointment of a receiver is not a matter of right, but of discretion, to be governed by the circumstances of the case, one of which circumstances is the probability of the plaintiff's being ultimately entitled to a decree. It is, moreover, a power always to be exercised with caution, and never except in a strong case. The general rule is to refuse an interlocutory application for a receiver, unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss." For authorities to the same effect in other jurisdictions, see 23 Am. & Eng. Ency. Law (2d ed.) 1038-9; 34 Cyc. 21; *Kanawha Coal Co.* v. *Ballard*, 43 W. Va. 721, 29 S. E. 514.

The First National Bank of Roanoke, by counsel, offered proof of a judgment against F. Rorer, to which counsel for the appellants objected, because the bank had refused to contribute anything to the cost of the suit. The master reported the judgment, however, and the appellants excepted to the master's report on the same ground, and the trial court overruled the exception. This ruling is assigned as error. The bank offered the proof by counsel of its own selection and could not be required to contribute to the compensation of counsel of appellants. The only other costs to which it could be required to contribute were the legal and taxable costs of the suit. If no property was disclosed in the suit, it was subject to a decree against it for its due proportion of such costs, but as the record discloses abundant property out of which the costs could be made, the question becomes one of no practical importance. There was no error in overruling the exception to the master's report.

For the reasons given I am of opinion that the decrees

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appealed from should be affirmed so far as they affect the property claimed by the city school board of the city of Roanoke, and that they should recover their costs against the appellants; and that so far as the said decrees affect the property claimed by the Norfolk and Western Railway Company, the city of Roanoke (other than the school property aforesaid) and by Mary R. Yates, F. Fallon, Mattie L. Vest, D. C. Moomaw, W. A. Burks and B. S. Headley, they should be reversed.

SIMS, J. (concurring in the result of the opinion of the majority of the court on all points involved in the case):

I concur in what is said in the opinion of Judge Whittle, P., and Judges Kelly and Prentis on the subject of the school property.

I concur in the result of the last-named opinion on the subject of the Norfolk and Western Railway Company property, on the following grounds:

As pointed out in the opinion last named, the adversary possession of the said railway company began before the liens of the judgments of appellants attached to the land in question. I think that, on the subject of such property, this is the pivotal point in the case. Upon the beginning of said adversary possession, Rorer, the judgment debtor, was ousted from the possession of the land in question. Thereupon the right of action arose—accrued—to Rorer (the person through whom the judgment creditors claim), to recover the land from the railway company's predecessors in title. The statute of limitations (section 2915 of the Code) thereupon began to run against the recovery of that land from its adversary possessors. Then Rorer no longer had the possession of the land. What he had was the bare legal title and a mere right of entry on the land and right of action to recover the possession of it. When the judgments of appellants were recovered, therefore, the

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liens of such judgments could attach only to the rights of the judgment debtor to the land just named, which were all of his rights to the land, then existing. Moreover the appellants acquired their judgment liens on such rights after the statute aforesaid had begun to run in favor of said adversary possessors and against such rights, and subject, further, to the statutory provision contained in said section 2915, to the effect that if said adversary possession should continue from its beginning for the statutory period "no person shall make an entry on or bring an action to recover" said land from said adversary possessors or any of them. Having begun to run in favor of said adversary possessors, such statute, by the express terms of it, continued to run in favor of such possessors, not only against Rorer, but against every person whomsoever claiming the land thereafter through him.

It is true that the judgment creditors are not suing in the proceeding in equity before us, to recover possession of the land. They are suing to enforce the liens of their judgments. But it would be but a barren victory for them to obtain a decree for the sale of the land to satisfy their liens, since any one purchasing it under such decree would be barred by said statute from making an entry on or bringing an action to recover the land from the said railway company, the adverse possessor thereof, and consequently no one would purchase under such decree. A court of equity will not do a vain thing. In such case equity follows the law in determining the rights of parties.

Hence, I think section 2915, aforesaid, applies to the case under consideration and that the adverse possession of the railway company, which had been continued from its said beginning for more than the statutory period before this suit against the railway company was instituted, is a bar to the enforcement by the appellants of the liens of their judgments.

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The opinion last named, however, goes further and holds that even if the adverse possession of the railway company had not begun until after the liens of the appellants attached, yet if it was continued for the statutory period before this suit was instituted against the railway company, it would bar the enforcement of the liens of said judgments. I cannot concur in such opinion in its going to that extent. To such a case I think that what is said in the above opinion of Judge Burks on the subject under consideration is applicable. It is there said, in substance, that by virtue of the statute law in Virginia a judgment creditor is given a statutory lien on the land of the judgment debtor as of the date the judgment lien attaches thereto, so that no subsequent acts of the judgment debtor, or subsequent acts of others ousting him from the possession of the land, can affect such statutory lien, so long as the judgment is alive; and that if such lien is enforced pursuant to such statute law, the conveyance under the decree of court operates, by virtue of such statute law, to pass the land to the grantee thereof with the right and title thereto standing precisely as it stood in the hands of the judgment debtor as of the date the judgment lien attached. I concur fully in all of this. And I agree that in case of the ouster of a judgment debtor from his possession of his land after the lien of a judgment against him has attached thereto, such ouster could not operate to affect the lien of the judgment or the right of entry on or of action to recover the land on the part of a subsequent purchaser of it under a decree of court selling the land to satisfy such lien. The adversary possession being taken at a point of time after the judgment lien attached, it would come too late to affect the lien of the judgment given and already fixed as of the time aforesaid by the statute law on that subject (cited by Judge Burks), and made by such statute law to continue co-existent with the life of the judgment. As applicable to

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such a case, I agree with what is said by Judge Burks in regard to the statute of limitations (section 2915) never beginning to run against the lien of the judgment. In such case no right of action would accrue to the judgment debtor prior to the time when the judgment creditor acquired his lien. It is only prior to such time that the judgment creditor, or a subsequent purchaser of the land under decree of court enforcing the judgment, can be said to claim through the judgment debtor. After such time the judgment creditor claims under and by virtue of the statute alone, and the lien given thereby, which is freed by the statute law from being affected by subsequent acts of the judgment debtor or of others suffered by him, unless indeed section 2915 affects the case. It is not claimed by any one that there is any other statute which could affect the case. Section 2915, as we have above seen, can affect the case only where the judgment creditor and subsequent purchaser aforesaid claim through the judgment debtor as of a time when the latter has been ousted of his possession so that the right of action to recover the land of the adversary possessor has arisen—which is not so in a case such as is now referred to. Hence, section 2915, aforesaid, cannot in such case affect the existence of the lien.

For the reasons stated in the next preceding paragraph, I cannot agree with Judge Burks in his conclusion on the subject under consideration, since they strengthen me in the conclusion that section 2915 does apply to a case where the adversary possession began before the judgment lien attached, and because of this conclusion I concur in the result of the opinion of Judge Whittle, P., and Judges Kelly and Prentis on the subject of the Norfolk and Western Railway Company's property, as above stated.

With the exceptions I have above noted, I concur in the opinion of Judge Burks on all other questions in the cause before us covered thereby.

Affirmed in Part; Reversed in Part.

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Richmond.

MOOMAW AND OTHERS v. NORFOLK AND WESTERN RAILWAY COMPANY AND OTHERS.

January 24, 1918.

(Rehearing refused, Wytheville, June 13, 1918.)

T. W. Miller, S. C. McNulty, M. M. Caldwell, Jackson & Henson, and *H. M. Moomaw,* for the appellants.

Roy B. Smith, Everett Perkins, L. H. Cocke, Staples & Cocke, and *W. W. Coxe,* for the appellees.

BURKS, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Montgomery county involving the correctness of the same decree reviewed in the case of *McClanahan's Administrator* v. *Norfolk & Western Railway Company, ante,* p. 705, in which an opinion has just been handed down. The two appeals were heard together, and all the questions raised in this case were decided in that, with the result that the decree appealed from must be affirmed.

Affirmed.

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CRIMINAL CASES

Richmond.

BARE V. COMMONWEALTH.

November 15, 1917.

1. INSTRUCTIONS—*Repetition.*—The failure of the trial court to give certain instructions at the request of the accused, which fairly and properly stated propositions of law upon which the accused had a right to rely, was not error, where these propositions were fully covered by instructions given at the instance of the Commonwealth, though the rejected instructions expressed these statements of law with greater emphasis. It is objectionable to multiply instructions which repeat the same propositions of law in different terms; therefore, it is not error to select between the two sets of instructions equally unobjectionable and to refuse to multiply instructions substantially the same in legal effect.
2. CRIMINAL LAW—*Arraignment and Plea—Misdemeanor.*—Virginia Code, 1904, section 4012, provides: "In prosecutions for misdemeanors, in cases not embraced by section 4010, after a summons has been executed ten days before the first day of the term of court, or if the accused was admitted to bail and made default, the court may either award a *capias* or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty." If the accused is absent, no arraignment can be made because of his absence, but nevertheless the court may proceed to trial just as if he had appeared and pleaded not guilty. If he is present when his case is called, he should plead, if he desires to make defense, and if he goes to trial without pleading, he thereby waives his right to do so. While arraignment is necessary in felony cases, it is not necessary in misdemeanors.
3. INTOXICATING LIQUORS—*Evidence—Chemist's Analysis—Letter of Commissioner of Agriculture.*—The Mapp act, Acts 1916, chapter 146, section 30½, makes it the duty of the State Commis-

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sioner of Agriculture, upon the written request of the proper official, to cause an analysis to be made of any mixture supposed to contain ardent spirits, and to return to the officer making such request the certificate of the chemist making the analysis. While only the certificate of the chemist is made evidence by the statute, such certificate is not evidence unless the Commissioner of Agriculture, in accordance with the statute has caused the analysis to be made, nor unless he also returns the chemist's certificate to the officer who has in writing requested such analysis. Accordingly, the letter of the commissioner accompanying the certificate of the chemist is admissible. And in the instant case the variance between the date of the letter of transmittal from the Commissioner of Agriculture, December 5, 1916, and the date of the affidavit of the chemist, the 15th day of December, 1916, was held immaterial, although it should have been explained.

4. "DWELLING"—*"Dwelling House."*—As construed by the courts from the earliest to the latest times, the words "dwelling" or "dwelling house" have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises, generally described as "within the curtilage."

5. "CURTILAGE."—In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not.

6. INTOXICATING LIQUORS — *"Home"—Permanent Residence—Mapp Act.*—Accused was convicted under an indictment charging him with unlawfully dispensing and giving away cider containing more than one per cent. of alcohol by volume, in violation of the prohibition act, Mapp law, Acts 1916, page 216. The trial court after instructing the jury that accused had the right to give away intoxicating liquor in his home, further told the jury that "the definition of the word home, in the sense in which that word is used in the law in this connection, cannot be extended to and does not include" an outhouse seventy-five or eighty feet from the dwelling of accused, between which and his dwelling were other small structures—as one of the witnesses says, "probably a pig pen and smoke-house"—and beyond which his barn and a small chicken house were located.

Held: That the court erred in instructing the jury that the out-

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house was not a part of the home of the accused. In such cases, if there be any doubt as to whether the building is a part of the *bona fide* home of the accused and his family, then the question should be submitted to the jury to determine from the evidence the question of fact involved.

7. INTOXICATING LIQUORS — *"Home"—Permanent Residence—Mapp Act.*—As used in the Mapp act, the words "home" and "permanent residence" must be construed to mean the place of residence rather than any particular building which may be at that place. And the words "in his own home," "in his home," "at his home" and "permanent residence of the person and his family" have substantially the same meaning, namely, anywhere within the curtilage. Except as to the places expressly excluded by this and the other sections of the act, the word "home," as used in the act, includes the curtilage and entire cluster of buildings used by the family as a habitation.

Error to a judgment of the Circuit Court of Rockingham county.

Reversed.

The opinion states the case.

C. R. Wingfield, for the plaintiff in error.

John Garland Pollard, Attorney-General, J. D. Hank, Jr., Assistant Attorney-General, and *Leon M. Bazile,* for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

The petitioner was convicted under an indictment charging him with unlawfully dispensing and giving away cider containing more than one per cent. of alcohol by volume, in violation of the prohibition act (the Mapp law, Acts 1916, p. 216), and sentenced to pay a fine of fifty dollars and be imprisoned in the county jail for one month and afterwards until the fine and costs are paid.

The pertinent facts are, that the accused manufactured

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cider "from fruit of his own raising" and stored the same in an outhouse seventy-five or eighty feet from his dwelling, between which and his dwelling were other small structures—as one of the witnesses says, "probably a pig pen and smokehouse"—and beyond which his barn and a small chicken house were located. This outhouse was about ten by twelve feet in size, was built for a grain house and used for the storage of the cider, for molasses intended for the family use, and other food such as apples, beans, etc., had sometimes been kept there. In this house were one barrel of such cider, and one-half barrel of it intended for vinegar, in which yeast had been put by the wife of the accused in order to hasten its fermentation. A number of visitors had been given cider taken from these receptacles, and in this outhouse, though there is no evidence of any concealment, disorder or intoxication.

Before discussing the main point at issue, it is proper to refer to certain other assignments of error.

1. It is objected that the court failed to give certain instructions, marked severally, A, E, and F. It is sufficient to say of these instructions that, while they fairly and properly state propositions of law upon which the accused had a right to rely, they are fully covered by instructions 1, 2 and 3 which were given by the court at the instance of the Commonwealth. These instructions which were given, fairly told the jury that the prisoner could not be convicted unless the cider contained more than one per cent. of alcohol by volume, nor unless his guilt was proved beyond a reasonable doubt, and that the accused had the right to manufacture cider of any strength from fruit of his own raising for domestic consumption at his home; and this in substance is all that was in the instructions which were refused, though the rejected instructions expressed these statements of law with greater emphasis. They were doubtless refused by the trial court for the very good reason

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that it is objectionable to multiply instructions which repeat the same propositions of law in different terms. All of these instructions might have been given, but it was not error to select between the two sets of instructions equally unobjectionable and to refuse to multiply instructions substantially the same in legal effect.

2. There is another exception based upon the fact that the prisoner was not arraigned and no plea was entered by him.

We have a statute in Virginia (section 4012 of the Code), which reads as follows: "In prosecutions for misdemeanors, in cases not embraced by section 4010, after a summons has been executed ten days before the first day of the term of court, or if the accused was admitted to bail and made default, the court may either award a *capias* or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty."

Certainly, if the accused is absent, no arraignment can be made because of his absence, but nevertheless the court may proceed to trial just as if he had appeared and pleaded not guilty. If he is present when his case is called, he should plead, if he desires to make defense, and if he goes to trial without pleading, he thereby waives his right to do so. While arraignment is necessary in felony cases, it is not necessary in misdemeanors. In *McKeever* v. *Commonwealth*, 98 Va. 864, 36 S. E. 995, in which the accused was charged with a misdemeanor, he did not plead, and this was regarded as immaterial by this court. The defendant should plead when he has the opportunity to do so, but if he does not, he cannot thereafter take advantage of such irregularity.

3. Another assignment of error grows out of the following state of facts: The Commonwealth, proceeding under section 30½ of the act, had secured from the Commissioner of Agriculture a certificate showing the alcoholic contents

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of the two samples of cider which had been taken from the accused. That paper reads thus:

"DEPARTMENT OF AGRICULTURE AND IMMIGRATION
"G. W. KOINER, *Commissioner.*

"RICHMOND, VA., *December 5th, 1916.*

"Analysis No. 8260-8261. Office No. 4334.

"MR. FRANK L. DOVEL, *Chief of Police,*
"Harrisonburg, Va.

"Dear Sir:

"Below you will find the analysis of the sample as numbered above. Which is labelled 2 bottles of cider for analysis.

"Very respectfully,

"G. W. KOINER,
"Commissioner.

"DIVISION OF CHEMISTRY.
"J. B. WEEMS, *State Chemist.*

"MR. G. W. KOINER, *Commissioner,*

"Dear Sir:

"The following is the analysis of the sample numbered as above, received from you:

"8260 No. 1 Alcohol by volume 5.51 per cent.
"8261 No. 2 Alcohol by volume 2.89 per cent.

"Very respectfully,

"C. M. BRADBURY,
"Chemist."

This certificate was obtained under section 30½ of the prohibition act, which makes it the duty of the State Commissioner of Agriculture, upon the written request of the proper official, to cause an analysis to be made of any mix-

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ture supposed to contain ardent spirits, and to return to the officer making such request the certificate of the chemist making the analysis.

The accused moved the court to instruct the jury to disregard that part of the paper which appeared above the signature of G. W. Koiner, commissioner, which the court refused to do. The variance between the date of the letter of transmittal from the Commissioner of Agriculture, December 5, 1916, and the date of the affidavit of the chemist, the 15th day of December, 1916, should have been explained, nevertheless the court correctly refused the instruction asked for by the accused. The statute not only makes it the duty of the Commissioner of Agriculture to cause the mixture to be analyzed, but also requires him to return to the officer making the request the certificate of the chemist showing such analysis, so that the letter of the commissioner transmitting the chemist's certificate identifies it. The two papers combined tend to indicate compliance with the statute. While it is true that only the certificate of the chemist is made evidence by the statute, such certificate is not evidence unless the Commissioner of Agriculture, in accordance with the statute, has caused the analysis to be made, nor unless he also returns the chemist's certificate to the officer who has in writing requested such analysis. *Gayle & Eason* v. *Commonwealth*, 115 Va. 958, 80 S. E. 741. When they are combined they indicate a compliance with the statute, while separated they would be meaningless and ineffective. We can only speculate as to why the Commissioner of Agriculture transmitted the certificate on the 5th of December while the certificate itself was not sworn to until the 15th of December. Possibly when first transmitted the certificate had not been sworn to. If this be true, the proper course was to supply the deficiency and have the affidavit made as promptly as possible. However this may be, the court rightly refused to instruct the jury to disregard

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the letter signed by the Commissioner of Agriculture with which the chemist's certificate was transmitted and by which it was authenticated.

4. The main point at issue is clearly presented in the record by instruction No. 2, which the court granted at the instance of the Commonwealth, and instructions B and C which were asked for by the accused and refused.

Instruction No. 2, given at the instance of the Commonwealth, reads as follows: "The court instructs the jury that while the law of this State allows a person to make cider of any strength from fruit of his own raising, for domestic consumption at his own home; and furthermore, allows one in his own home to give ardent spirits, including cider of more than one per cent. alcohol, to another person, or to other persons, yet the right to give to another person cider containing more than one per cent. of alcohol, by volume, or any other ardent spirits, can only be exercised in the home of the giver, and the court further tells the jury that the definition of the word home, in the sense which that word is used in the law in this connection, cannot be extended to, and does not include, the outhouse mentioned in the evidence in which the accused kept his cider, and therefore that if the jury believe from the evidence beyond reasonable doubt that the cider dispensed or given away by the defendant, after November 1, 1916, as shown in the evidence, contained at the time more than one per centum of alcohol, by volume, then they should find the accused guilty as charged in the indictment and fix his punishment at a fine of not less than $50.00 and not more than $500.00, and confinement in jail for not less than one month and not more than six months."

From this instruction it appears that the court, after telling the jury that the accused had the right to give away intoxicating liquor in his home, further told the jury that "the definition of the word home, in the sense in which that

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word is used in the law in this connection, cannot be extended to and does not include the outhouse mentioned in the evidence in which the accused kept his cider." This, as will be noted, took the question away from the jury and in effect instructed them to find the accused guilty.

Instructions B and C, tendered by the accused, read thus:

B. "The court instructs the jury that the word home as used in the law here to be applied, means the permanent residence, or abiding place of a person (other than a club, hotel, boarding house, etc.) and includes with the actual dwelling house, or place, all outbuildings commonly used and intended for necessary or convenient use in connection with the use of the whole as a home.

"Whether or not the cider given away by the accused was at time of such giving of a greater strength than is by law allowed, where the giving is not shown to be within the home of the giver, and whether or not the giving occurred within the home of the accused, are questions of fact to be determined by the jury, upon the evidence."

C. The court instructs the jury that a person having a home, as defined by law, and by the instructions given, may lawfully give away cider, in such home, provided that such giving is in no wise a shift or device to evade the provisions of the law. And the court further instructs the jury that if they believe from the evidence that the giving of cider by the accused, as charged in the indictment, and shown in the evidence, occurred only within the home of the accused, in the sense in which home has been defined to them, and that such giving was in no wise a shift or device to evade the provisions of the law, they will find the accused not guilty."

From these latter instructions it appears that the prisoner asked the court to instruct the jury that the word "home," as used in the act, includes with the actual dwelling house, or place, all outbuildings commonly used and in-

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tended for necessary or convenient use in connection with the use of the whole as a home, and to submit to the jury, upon the evidence, the question whether or not the giving occurred within the home of the accused, as thus defined; and instruction C cautioned the jury that in order to acquit the prisoner they must further believe that such action on his part was in no wise a shift or device to evade the provisions of the law. So that the issue is thus very clearly presented as to the proper construction to be given the several provisions in the act authorizing the dispensing of intoxicating liquors in the home.

Section 8 of the act allows the manufacture and domestic use of cider from fruit of the owner's own raising "at his home." Section 16 prohibits the giving away of ardent spirits in any place "except in a *bona fide* 'home.'" Section 39 permits the transportation of ardent spirits in small quantities by common carriers, and requires the consignee to make affidavit that the liquor received is for "his own use in his own home," and authorizes any person to carry it "in his baggage for the *bona fide* use of himself or his family." Section 42 refers to a "*bona fide* home." Section 61 reads thus:

"Nothing in this act shall prevent one, in his own home, from having and there giving to another, ardent spirits, when the quantity of such spirits shall not exceed the quantity allowed by this act, to be kept in his home, and such gift is in no wise a shift or device to evade the provisions of this act; but the word 'home,' as used herein, shall be the permanent residence of the person and his family, and shall not be construed to include a club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house, provided that any transient guest may carry in his baggage for the *bona fide* use of himself or family not in excess of one quart of ardent spirits, the same not to be opened or used, or

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given away by such transient guest during his stay in said hotel or boarding house."

Section 65 makes the possession of ardent spirits, in certain quantities *prima facie* evidence of intent to sell in any prosecution under the act, and uses the expressions, "his home," "in his home," "to his own home," and "at the home."

We know of no analogy in the law for the construction of this language, except such as is found in the common and statute law referring to arson, burglary, and to homicide and assault cases, where the prisoner claims to have committed the alleged crime in self defense after having retreated to his castle, or his home. As construed by the courts from the earliest to the latest times, the words "dwelling" or "dwelling house" have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises, generally described as "within the curtilage."

Sir Mathew Hale says: "*Domus mansionalis* doth not only include the dwelling house but also the outhouses that are parcel thereof * * * if they are parcel of the messuage, though they are not under the same roof, or joining contiguous to it." Hale's Pleas of the Crown (558).

Blackstone (4 Bl. m. p. 225) announces the same doctrine, saying that if the houses are within the common fence, though not under the same roof or contiguous, a burglary may be committed therein "for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall."

In 3 Greenleaf (2d ed.), sec. 80, we find this succinct and comprehensive statement: "The term 'mansion,' or 'dwelling house,' comprehends all the outbuildings which are parcel thereof, though they be not contiguous to it. All buildings within the same curtilage or common fence, and used by the same family, are considered by the law as parcel of

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the mansion. If they are separated from the dwelling house, and are not within the same common fence, though occupied by the same owner, the question, whether they are parcel of the mansion or not, is a question for the jury upon the evidence."

Mr. Bishop says: "A dwelling house need not be under one roof. It may be a cluster of separate buildings, and it includes the outhouses and buildings in the cluster, appurtenant and auxiliary, being parcel of the messuage and within the curtilage, and which are subservient to the main dwelling for the purpose of habitation." 2 Bish. Cr. Law (7th ed.), sec. 104; *State* v. *Wilson*, 2 N. C. 242; *Pitcher* v. *People*, 16 Mich. 147.

Pendleton, P., in *Commonwealth* v. *Posey*, 4 Call (8 Va.) 122, 2 Am. Dec. 560, says: "Dwelling house is a complex term, and scarcely more certain than house; for it is not confined to any particular room in the building, nor even to the same room, but it extends to all the houses belonging to the curtilage."

In *Page* v. *Commonwealth*, 26 Gratt. (67 Va.) 947, Moncure, P., says: "An outhouse, adjoining a dwelling house, or under the same roof, or within the curtilage thereof and occupied therewith, was considered, at common law, as part and parcel of the dwelling house, within the meaning of the law concerning arson and burglary."

In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not.

In *Pond* v. *People*, 8 Mich. 150, it was held in a case in which the prisoner was charged with murder, that a build-

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ing thirty-six feet distant from the prisoner's house, used for preserving the nets employed in the owner's ordinary occupation as a fisherman, and also as a dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence, and that a fence is not necessary to include buildings within the curtilage if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings.

It would seem that the special privileges pertaining to a man in his own habitation are available for his protection only while he is in such space as is usually occupied for the purposes of the dwelling and the customary outbuildings. *Lee* v. *State,* 92 Ala. 15, 9 So. 407, 25 Am. St. Rep. 17; *People* v. *Taylor,* 2 Mich. 250.

The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling. 3 Cyc. 988; *Washington* v. *State,* 82 Ala. 31, 2 So. 356; *Cook* v. *State,* 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688; *State* v. *Shaw,* 31 Me. 523; *Commonwealth* v. *Barney,* 10 Cush. (64 Mass.) 480; *Unseld* v. *Commonwealth,* 140 Ky. 529, 131 S. W. 263, 140 Am. St. Rep. 393.

Coming to the case and statute under consideration, it seems evident from such analogy as well as in accord with common understanding and acceptation that the words "home" and "permanent residence" must be construed to mean the place of residence rather than any particular building which may be at that place. It is the home which is loved, the spot to which when absent we expect to return, and which is idealized in our favorite song; that place, or castle, which no man may enter without the consent of the owner, and in defense of which, and of every part of which, the taking of human life has been frequently excused.

The contention that the keeping and giving away of

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ardent spirits in this State, under this statute, must be confined to a particular building at such home, would lead to the grossest discrimination. In the case under consideration, where the evidence shows that the accused is a small farmer, that his main dwelling is small, and in which there is no suitable place in which to store his barrels of cider, if the contention of the Commonwealth be correct, this man could not store any cider of his own manufacture from fruit of his own raising, because all the available space in such main dwelling is already fully occupied. The statute accords the privilege to all who occupy a *bona fide* home, while such a construction would restrict and limit it to those only who occupy large houses with wine cellars or other ample places for the storage of liquor. In many *bona fide* homes in Virginia there are no such facilities, in some instances the entire family do not sleep under the same roof, but either regularly or at times, because of the crowded condition of the main house, must sleep in other buildings which are within the yard or curtilage. In many other instances the kitchen, or dining room, or both, or store rooms, are detached buildings and not under the same roof with the main dwelling house. It is perfectly clear that words "at his home," as used in the statute, mean anywhere within the curtilage, as from time immemorial defined. We think that the words "in his own home," "in his home" and "permanent residence of the person and his family," as used in section 61, should be construed to have substantially the same meaning as the words "at his home." This construction is greatly strengthened by section 61 itself, which apparently recognizes the inclusive meaning of the word "home" by expressly excluding certain places which would otherwise be construed to come within such definition—that is, by providing that no club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house, shall be construed

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as included within the definition. But for this exclusion many of the places indicated could and should be construed as the permanent home of a person and his family. Except as to the places expressly excluded by this and the other sections of the act, the word "home," as used therein, includes the curtilage and entire cluster of buildings used by the family as a habitation.

It follows, therefore, that we are of opinion that the court erred in instructing the jury that the outhouse in which the cider was dispensed was not a part of the home of the accused. In such cases, if there be any doubt as to whether the building is a part of the *bona fide* home of the accused and his family, then the question should be submitted to the jury to determine from the evidence the question of fact involved. The instructions B and C, requested for the accused and refused by the court, are in accord with this view, were clearly right under the evidence in this case, and should have been given to the jury.

For the error of the court in refusing to give these two instructions, the judgment must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with the views herein expressed.

Reversed.

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Richmond.

BLAIR V. COMMONWEALTH.

November 15, 1917.

1. INDICTMENT—*When Bad on Demurrer.*—Where every fact charged in an indictment may be true and yet the accused be guilty of no offense, the indictment is bad on demurrer.
2. INDICTMENT—*Conclusions of Law.*—Whether an act is lawful or unlawful is a question of law and not of fact, and it is the province of an indictment to state facts and not conclusions of law.
3. INTOXICATING LIQUORS—*Indictment.*—An indictment found at the January term, 1917, of the Circuit Court of Clarke county, charging that accused, within one year next prior to the finding of the indictment in the said county of Clarke, did unlawfully have in his possession at the same time two quarts of whiskey, is bad on demurrer, in that the prohibition law, under which the indictment was framed, did not go into effect till after November 1, 1916, and prior to that date it was not an offense for a person to have in his possession at one time two quarts of whiskey.

Error to a judgment of the Circuit Court of Clarke county.

Reversed.

The opinion states the case.

A. Moore, Jr., & Son, for the plaintiff in error.

Attorney-General John Garland Pollard, Assistant Attorney-General Leslie C. Garnett and *Leon M. Bazile,* for the Commonwealth.

BURKS, J., delivered the opinion of the court.

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The plaintiff in error was indicted, tried and convicted in the Circuit Court of Clarke county for violating the provisions of the prohibition law (Acts 1916, p. 215). The evidence is not certified, but it appears that at the January term, 1917, of the court an indictment was found against him, charging that "Henry Blair, within one year next prior to the finding of this indictment in the said county of Clarke, did unlawfully sell, give away, offer, dispense, keep and store for sale and gift ardent spirits and within said time did have in his possession in said county at the same time two quarts of whiskey against the peace and dignity of the Commonwealth of Virginia."

There was a demurrer to the indictment, which the court overruled. The grounds of the demurrer were: First, "that said indictment failed to state the violation of any law of the Commonwealth of Virginia," and second, "that said indictment in the charging part thereof, mingles acts that, if committed, are not violations of the statute with acts that may be such violations." After the demurrer was overruled the Commonwealth was required to elect for which offense it would go to trial, and it "elected to proceed against the defendant on the charge contained in the indictment that the defendant did unlawfully have in his possession at the same time two quarts of whiskey."

The prohibition law, under which the indictment was framed, did not go into effect till after November 1, 1916, and prior to that date it was not an offense for a person to have in his possession at one time two quarts of whiskey. So that every fact charged in the indictment may be true and yet the defendant be not guilty of any offense. Whenever this is true, the indictment is bad on demurrer. *Shiflett's Case,* 114 Va. 876, 77 S. E. 606; *Young's Case,* 15 Gratt. (56 Va.) 664; *Bruce's Case,* 26 W. Va. 153. Whether an act is lawful or unlawful is a question of law and not of fact, and it is the province of an indictment to state facts and not conclusions of law.

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"No matter material to render the act imputed to the defendant unlawful can be omitted, and the supposed offense must be described with at least reasonable certainty. If it be defective in these respects, the presentment cannot avail for any legal purpose whatever." *Bishop's Case,* 13 Gratt. (54 Va.) 785.

In the instant case time is of the essence of the offense, and should have been so stated as to charge the unlawful possession after November 1, 1916. *Cool's Case,* 94 Va. 799, 26 S. E. 411; *Shiflett's Case, supra.*

Reversed.

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Syllabus.

Richmond.

COCHRAN v. COMMONWEALTH.

November 15, 1917.

1. STATUTES—*Constitutional Law—Title—Liberal Construction of Section 52, Constitution of 1902.*—Section 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title, is to be liberally construed in determining whether an act is broader than its title; the act is to be upheld if practicable; and the title of an act is sufficient if the provisions of the act may be fairly regarded as in furtherance of the object expressed in its title.
2. STATUTES—*Constitutional Law—Title—Liberal Construction of Section 52, Constitution of 1902.*—All that is required by section 52 of the Constitution is that the subjects embraced in the statute, but not specified in the title, be congruous and have natural connection with or be germane to the subject expressed in the title, as instrumentalities for the accomplishment of the general purposes of the act.
3. STATUTES — *Constitutional Law — Title — Prohibition Act.*—The prohibition act (Acts 1916, chapter 146, page 215) is not unconstitutional, in that it violates section 52, Constitution of 1902, in so far as it prohibits, by section 40, the acceptance and receipt of ardent spirits. The regulation of the acceptance and receipt of ardent spirits by transportation is not only in furtherance of the "enforcement" of the act mentioned in its title, but may be said to be essential thereto.
4. INTOXICATING LIQUORS—*Prohibition Act—Section 40 of the Act—Indictment.*—Under section 40 of the prohibition act (Acts 1916, chapter 146, page 215), which creates the offense for which the accused in the instant case was indicted, if the ardent spirits, the delivery of which was received and accepted by him, were brought or transported by the express company, it is immaterial whether such bringing or transportation was from without or from one point to another within the State. Whether one or the other, if the ardent spirits were transported by the express company (as in the instant case) and the other essential ingredients of the offense existed, the receipt and acceptance of the delivery of the ardent spirits

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constituted the offense created by the statute. That is to say, whether the ardent spirits were "brought into this State from any point without the State or * * * transported from one point to another within the State," was not of the essence, not an essential ingredient of the offense. Consequently, it was not necessary that any allegation with respect thereto be contained in the indictment.

5. INTOXICATING LIQUORS—*Prohibition Act—Receipt Oftener than Once a Month.*—An indictment under the prohibition act alleging the receipt and acceptance by the accused of delivery of one quart of distilled liquor on November 29th and another quart of same on December 23, 1916 (in effect two quarts of such liquor within the one calendar month beginning with November 29, 1916), charged an offense created by section 40 of the prohibition act, and an allegation in the indictment that the receipt and acceptance was "within a period of thirty days" may be treated as surplusage.

6. INTOXICATING LIQUORS—*Prohibition Act—Section 40—Receipt and Delivery of More than a Quart a Month—Meaning of the Word "Month."*—The prohibition act (Acts 1916, page 215), section 40, provides that no person shall receive or accept delivery from any express company of any ardent spirits brought into the State from any point without the State, or ardent spirits transported from one point to another point within the State, except that a person may receive one quart of distilled liquor not oftener than once a month. Section 3 of the Code of 1904 provides that, "Unless otherwise expressed the word 'month' shall be construed to mean a calendar month." Giving this meaning to the word "month" in the words "not oftener than once a month," it must be read as "not oftener than once a (calendar) month." So a receipt and acceptance of liquor in excess of one quart in the aggregate, between November 29th and December 23, 1916, inclusive, would have been a receipt and acceptance of such excess quantity of liquor oftener than once a calendar month.

7. PROHIBITION ACT—*Indictment and Information—Negativing Exceptions.*—An indictment under section 40 of the prohibition act (Acts 1916, page 215) need not negative and exclude by its allegations the possibility that the accused came within any other exceptions of the statute allowing a person to receive ardent spirits—such as the allowing one to receive the same without limit as to quantity in the home of a neighbor, by section 61—and if personally brought from without the State in a limited quantity not in excess of one quart within a period of thirty days, allowed by section 39 of the act.

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8. INDICTMENT AND INFORMATION—*Negativing Exceptions—Separate Sections of the Statute.*—Where exceptions are created by other sections of an act than that under which an offense is charged in an indictment, the indictment need not negative and exclude by its allegations the possibility of the act of the accused charged thereby coming within any of such exceptions.

9. PRESUMPTIONS AND BURDEN OF PROOF—*Instructions—Presumption of Innocence.*—On a trial under the prohibition act, the following instruction was asked for and refused: "The court instructs the jury that the accused is presumed to be innocent."

Held: No error, as it in effect announced a conclusion of the court, that notwithstanding the evidence in the case the accused was still presumed to be innocent. The correct rule on the subject is that the accused is presumed to be innocent until his guilt is established by the evidence.

10. PROHIBITION ACT—*Instructions—Contents of Package Received by Accused.*—In a prosecution under section 40 of the prohibition act, where the record of the express office and the affidavits of accused excluded every rational hypothesis of the innocence of the accused consistent with the evidence in the case, it is not error to refuse an instruction that the burden is upon the Commonwealth to prove beyond all reasonable doubt that the substance contained in the package delivered to the defendant was distilled spirits.

11. PROHIBITION ACT—*Prosecution Under Section 40—Corpus Delicti.*—The *corpus delicti* in a prosecution for violation of section 40 of the prohibition act (Acts 1916, page 215), was the fact that some one person received delivery of whiskey in excess of one quart in quantity within a period of one calendar month as charged in the indictment; and the express record alone, showing the receipts by the accused of two quarts of liquor within the calendar month, was *prima facie* evidence of that fact, and in the absence of rebutting evidence such *prima facie* evidence became conclusive.

12. CORPUS DELICTI—*Circumstantial Evidence.*—Direct evidence is not essential to prove the *corpus delicti* in any case. It may be proved as any other fact may be proved which is essential to establish the guilt of the accused, namely, by circumstantial evidence which produces "the full assurance of moral certainty" on the subject.

13. PROHIBITION ACT—*Evidence—Express Records—Corpus Delicti.*—There is no merit in a contention that, in a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the record of the express company and affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved.

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14. CORPUS DELICTI—*Admissions of Accused.*—Independent of statute, the admissions of the accused "are competent evidence tending to prove the *corpus delicti.*"

15. PROHIBITION ACT—*Evidence—Affidavits of Accused.*—By the prohibition act (Acts 1916, page 215), the affidavits of the accused filed with the express company are made *prima facie* evidence, and they are evidence, independent of statute, as to all facts which they tend to prove which are material in the case, including the *corpus delicti*, although in the absence of corroborative evidence they would be insufficient to establish it. The express records however are such corroborative evidence.

16. PROHIBITION ACT—*Constitutional Law—Admission of Records.*—In a prosecution under the prohibition act the admission of the records of the express company made by strangers to him, does not violate the constitutional right of the accused to be confronted with his accusers and witnesses.

17. CONSTITUTIONAL LAW—*Documentary Evidence—Admissibility in Criminal Cases.*—The constitutional right of a defendant in a criminal prosecution to be confronted with his accusers and witnesses does not exclude proper documentary evidence. Documentary evidence is admissible in criminal as in civil cases, under the same rules which define and limit its admissibility.

18. PROHIBITION ACT—*Documentary Evidence—Records of Express Company.*—In a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the express records, independent of statute, are admissible in evidence, when properly authenticated, as a part of the *res gestae;* and, further, under the rules of evidence provided by the act in question, the record is expressly made admissible in evidence.

19. PROHIBITION ACT—*Affidavit of Accused Admissible as a Confession.*—Affidavits of accused, when receipting for liquor from an express company, were admissible in evidence under the rules applicable to the admissibility of documentary evidence, as confessions of the accused.

20. PROHIBITION ACT—*Section 40—Punishment.*—Section 40 of the prohibition act creates the receipt and acceptance of delivery by transportation of ardent spirits in a quantity in excess of one quart within a period of one month a statutory offense, in addition to and different from the offenses created by the concluding sentence of such section, and the offense is punishable under section 5 of the act, and not under section 40.

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Error to a judgment of the Circuit Court of Rockingham county.

Affirmed.

The indictment against the accused (omitting the formal parts) contained the following charge against him, namely: That he—

"* * * did heretofore, since the first day of November, 1916, to-wit: on the 23rd day of December, 1916, unlawfully receive and accept delivery of ardent spirits from the Southern Express Company, a corporation and common carrier, in this, that on the said 23rd day of December, 1916, he, the said Charles Cochran, against the form of the statute, received and accepted delivery of one quart of whiskey from the said Southern Express Company, at its office in the city of Harrisonburg, in the county aforesaid, having within a period of thirty days prior thereto, to-wit: on November 29, 1916, received and accepted delivery of a certain other quart of whiskey from the same carrier at the same place, both of the said deliveries being of whiskey consigned to the said Charles Cochran and transported by the said Southern Express Company * * *"

There was a demurrer to the indictment which was overruled by the trial court, followed by a trial by jury. The verdict of the jury found the accused guilty as charged in the indictment, fixed his punishment at a fine of $50.00 and costs and confinement for thirty days in the county jail, upon which sentence was pronounced and judgment of the trial court was entered accordingly.

THE EVIDENCE.

No evidence was introduced by the accused.

The only evidence in the case was that introduced by the Commonwealth. Such evidence consisted of the testimony

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of the express company's agent, W. C. Gaither, and the express company's records and affidavits of the accused kept and made as required by statute.

The testimony of said agent and such records and affidavits (so far as material) are as follows:

"That he is the agent at Harrisonburg, Virginia, of the Southern Express Company, a common carrier, and was such agent at the time of the occurrences hereinbefore mentioned, the defendant Chas. Cochran, a colored man, on November the 29, 1916, called at the office of the said Southern Express Company, in the city of Harrisonburg, and asked if there was a package of whiskey there for him from Hagerstown, Maryland; that upon being advised that there was, Cochran receipted for the same by signing the company's record book, and then made the following affidavit, which was printed on back of express special liquor record (as follows):

"State of Virginia,

"County of Rockingham.

"I, Chas. Cochran, being duly sworn, depose and say that I am the consignee of a certain shipment of ardent spirits as specified on the other side of this form, this day delivered to me by the Southern Express Company, from Hagerstown, Maryland; that I am not a student or minor, and, if a female, I am the head of a family; that the ardent spirits so received by me were brought into the State on my written order, and that I have not, within the thirty days previous hereto, received any ardent spirits of any kind whatsoever, from any person or from any place whatsoever, in excess of the quantity allowed by the provisions of the act of the General Assembly of Virginia, approved March 10, 1916, or contrary to law, and that the ardent spirits so received by me are for my own use at my own home, and that the said ardent spirits will not be used in violation of law.

"(Signed) CHAS. COCHRAN,

"Consignee."

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"Sworn to and subscribed before me, this 29th day of November, 1916.

"(Signed) W. C. GAITHER, *Agent for*
"Southern Express Company.
"SOUTHERN EXPRESS COMPANY,
"(Incorporated)"

"Form 370-Va. "Special Liquor Record.

"Received at Harrisonburg, Virginia, date November 29, 19.... Affidavit No. 152.

"Consignee, Chas Cochran.

"Kind of ardent spirits, whiskey,—amount 1 qt., weight 4 lbs. Way-bill No. 688, date November 27, 1916, from Hagerstown, Md.''

"Paid the express charges, received the package, and departed with it.

"That on December the 23, 1916, the said Cochran again appeared at the office and again asked if there was a package of whiskey there for him from Hagerstown, Maryland, and upon being advised that there was, he signed the express record book and made the following affidavit which is written on the back of the express liquor record, (as follows):"

(Here followed affidavit precisely the same as the above affidavit only it being dated as made December 23, 1916).

"Special Liquor Record.

"Received at Harrisonburg, Va., date 12-22, 19..., affidavit No. 148. Consignee, Chas Cochran.

"Kind of ardent spirits, whiskey, amount 1 quart, weight 4 lbs. Way-bill No. 1570, date 12-21, 19..., from Hagerstown, Maryland.

"Paid the express charges and departed with the package.

"That on each of said occasions there was a quart of whiskey for said Cochran at the express office, which was shipped from the city of Hagerstown, in the State of Mary-

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land, to said Cochran, as consignee, at Harrisonburg, and that the same was transported by the Southern Express Company, that each of said packages was labelled one quart of whiskey and was a carton about twelve inches long by four inches wide, such cartons as are regularly used in the shipment of whiskey."

On cross-examination the witness testified, "that he did not open the package or examine the contents of the packages or either of them, that they were sealed when received and he did not break the seals, and did not know from actual personal knowledge what the contents were. The packages were labelled whiskey with large letters as the law required, and were carried by the company as whiskey, one quart each, and Cochran inquired for whiskey and receipted for it as whiskey."

FURTHER PROCEEDINGS.

The accused objected to the admission in evidence of said affidavits, on the ground that the Commonwealth had not proved the *corpus delicti* and that until such was proven it was improper to introduce any admissions of the accused, but their introduction in evidence was permitted by the trial court over such objection.

INSTRUCTIONS.

After all the testimony had been introduced the accused asked the court to give the following instructions, all of which were refused:

1. "The court instructs the jury that the accused is presumed to be innocent."

2. "The court instructs the jury that the burden is upon the Commonwealth to prove beyond all reasonable doubt that the substance contained in the package delivered to the

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defendant was distilled spirits and unless this has been done, the jury must find the defendant not guilty."

3. "The court instructs the jury that neither the express bill, the affidavit nor the express records, nor all of them combined, are sufficient proof to establish the guilt of the defendant in this case, for the burden rests on the Commonwealth to prove beyond all reasonable doubt, that the contents of the packages received by the defendant was distilled spirits."

4. "The court instructs the jury that the defendant under the law is entitled to receive not oftener than once each calendar month, one quart of distilled liquor, and if the jury believe from the evidence that the defendant in the months of November and December, 1916, did receive but one quart of distilled liquor in each of said months, then the jury will find the defendant not guilty."

5. "If the jury shall find the defendant not guilty they will say so, and no more; if they find him guilty, they will say so and ascertain his punishment, which shall be a fine of not less than $50.00 or confinement in jail, or both, in the discretion of the jury."

Upon the rendition of said verdict of the jury the accused moved the trial court to set aside as contrary to the law and the evidence and grant him a new trial, which motion the court overruled and entered the judgment aforesaid.

THE MATERIAL FACTS.

Regarding the evidence in the case under the rule applicable in this court, the following facts, material in the case, must be taken as proved, namely:

That the accused received and accepted delivery from an express company of ardent spirits brought into the State from a point without the State in the quantity of two quarts between November 29th and December 29th, which

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would have been two quarts within one calendar month, to-wit, one quart thereof on November 29th and another quart thereof on December 23, 1916.

Charles A. Hammer, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leslie C. Garnett,* for the Commonwealth.

SIMS, J., after making the above statement, delivered the opinion of the court as follows:

The assignments of error raise the following questions which will be considered and disposed of in their order as stated below:

1. Is the act of Assembly, 1916, p. 215 (under which the indictment in the instant case was found), unconstitutional in so far as it prohibits the acceptance and receipt of ardent spirits, in that it violates section 52 of the Constitution of Virginia with respect to its title not being broad enough to admit of such enactment?

The title to the act, so far as pertinent to the above question, is as follows: "An act to define ardent spirits and to prohibit the * * * use, sale, offering for sale, transportation for sale, keeping for sale, and giving away of ardent spirits, except as provided herein; * * * to prescribe the force and effect of certain evidence and (in) prosecutions for violation of this act; * * * prescribing certain rules of evidence in certain prosecutions under this act; * * * to prescribe for the enforcement of this act * * *"

The rule is well settled that the Constitution (section 52) is to be liberally construed in determining whether an act is broader than its title; that the act is to be upheld if prac-

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ticable; that the title of an act is sufficient if the provisions of the act may be fairly regarded as in furtherance of the object expressed in its title. All that is required by section 52 of the Constitution is that the subjects embraced in the statute, but not specified in the title, be congruous and have natural connection with or be germane to the subject expressed in the title, as instrumentalities for the accomplishment of the general purposes of the act. *Iverson Brown's Case,* 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110; *Ellinger's Case,* 102 Va. 100, 45 S. E. 807; *Willcox's Case,* 111 Va. 849, 69 S. E. 1027; *District School Board* v. *Spilman,* 117 Va. 201, 84 S. E. 103; *Whitlock* v. *Hawkins,* 105 Va. 242, 53 S. E. 401; *Conk* v. *Skeen,* 109 Va. 6, 63 S. E. 11.

Tested by the rule above stated, the above question must be answered in the negative. The regulation of the acceptance and receipt of ardent spirits by transportation is not only in furtherance of the "enforcement" of the act mentioned in its title, but may be said to be essential thereto.

2. Is the indictment in the instant case defective in that it does not charge that the ardent spirits, the delivery of which is alleged to have been made and accepted by the accused, were "brought into this State from any point without the State, or * * * transported from one point to another within the State?"

Under section 40 of the act, which creates the offense for which the accused was indicted, if the ardent spirits, the delivery of which was received and accepted by him, were brought or transported by the express company, it is immaterial whether such bringing or transportation was from without or from one point to another within the State. Whether one or the other, if the ardent spirits were transported by the express company (as in the instant case) and the other essential ingredients of the offense existed, the receipt and acceptance of the delivery of the ardent spirits constituted the offense created by the statute. That is to

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say, whether the ardent spirits were "brought into this State from any point without the State or * * * transported from one point to another within the State," was not of the essence, not an essential ingredient of the offense. That being so it was not necessary that any allegation with respect thereto be contained in the indictment. *White's Case*, 107 Va. 901, 59 S. E. 1101; *Fletcher's Case*, 106 Va. 840, 56 S. E. 149; *Rose's Case*, 106 Va. 850, 56 S. E. 151; *Runde's Case*, 108 Va. 873, 61 S. E. 792; *Clopton's Case*, 109 Va. 813, 63 S. E. 1022; *Dix's Case*, 110 Va. 907, 67 S. E. 344; *Ferrimer's Case*, 112 Va. 897, 72 S. E. 699; *Shiflett's Case*, 114 Va. 876, 77 S. E. 606.

The indictment in the instant case charges that the deliveries of liquor in question were by transportation and it contains allegations of the other essential ingredients of the offense, and therefore complies with the requirements of law in question.

3. Does the indictment, in alleging the receipt and acceptance by the accused of delivery of one quart of distilled liquor on November 29th and another quart of same on December 23, 1916 (in effect two quarts of such liquor within the one calendar month beginning with November 29, 1916) charge an offense created by section 40 of the statute in question?

The language of section 40 of said act, which creates the offense for which the accused was indicted in the instant case, so far as material, is as follows:

"Section 40. No person in this State shall receive or accept delivery from any * * * express company * * * any ardent spirits brought into this State from any point without the State, or ardent spirits transported from one point to another point within this State, except as follows: He may receive one quart of distilled liquor * * * not oftener than once a month * * *."

Section 5 of the Code of Virginia provides that, "Unless

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otherwise expressed the word 'month' shall be construed to mean a calendar month." Giving this meaning to the provision of the other statute above quoted, namely, "not oftener than once a month," it must be read as "not oftener than once a (calendar) month." Now from November 29th, a calendar month would extend to December 29th. To illustrate: A negotiable note dated November 29, 1916, payable one month after date, would fall due on December 29, 1916. So that a receipt and acceptance of liquor in excess of one quart in the aggregate, between November 29th and December 23, 1916, inclusive, would have been a receipt and acceptance of such excess quantity of liquor oftener than once a calendar month. Therefore, it is plain that question 3 above must be answered in the affirmative.

So far as the instant case is concerned, the allegation in the indictment that the said receipt and acceptance was "within a period of thirty days" may be treated as surplusage. Hence, also, the positions taken in the extended argument on both sides of the case, both orally and in the petition and in the briefs of counsel, on the subject of the thirty-day period, need not be discussed by us. However, if such an allegation had been necessary in the instant case and was not surplusage, the offense charged was committed "within a period of thirty days" and was, therefore, proved as laid in the indictment, and hence, also, we need not further enter upon the discussion of the subject in the instant case.

4. Is the indictment defective in that it does not negative and exclude by its allegations the possibility that the accused came within any other exceptions of the said statute allowing a person to receive ardent spirits—such as the allowing one to receive same without limit as to quantity in the home of a neighbor, by section 61—and if personally brought from without the State in a limited quantity not in excess of one quart within a period of thirty days, allowed by section 39 of the act?

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Section 40, which creates the offense charged in the indictment in the instant case, concerns the receipt and acceptance by persons of delivery of ardent spirits by transportation for them and creates an offense of the act of such receipt and acceptance of such delivery by transportation from any person or from any place whatever from without or from within the State. Therefore, the receipt of distilled liquor referred to in such section of the statute "from any person or from any place," has reference only to receipts of liquor by transportation. Similarly the phrase in section 40 of the act, "in excess of the quantity allowed by this act," has reference only to the quantity of ardent spirits allowed by such section to be received by a person *by transportation* for him by some person or common carrier other than himself. Hence, the other exceptions of the statute in other sections thereof allowing a person to receive ardent spirits, referred to in the question, have no application to the said offense created by section 40 of the act. If the accused committed that offense he could not come within any of the other exceptions of the statute in reference to the receipt of ardent spirits, since none of those exceptions consist of such receipt *by transportation* for the accused. Therefore, the question under consideration must be answered in the negative.

But if this were not so and the receipt of ardent spirits allowed by other sections of the act than section 40 thereof would constitute exceptions within which the act of the accused of receiving ardent spirits might fall, so that he would not have been guilty of any offense under the statute, still it is well settled that, since such exceptions are created by other sections of the act than section 40, under which the offense is charged in the indictment in the instant case, the indictment need not negative and exclude by its allegations the possibility of the act of the accused charged thereby coming within any of such exceptions.

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Hill's Case, 5 Gratt. (46 Va.) 682, 687, *et seq; Hendricks' Case,* 75 Va. 934, 943; *Devine's Case,* 107 Va. 860, 60 S. E. 37, 13 Ann. Cas. 361.

5. We come now to the consideration of the instructions offered by the accused and refused by the trial court, and whether such court committed any error in refusing to give such instructions?

(a) As to the first instruction above quoted: It was not in proper form to correctly instruct the jury as to the presumption of innocence attending the accused. It in effect announced a conclusion of the court, and peremptory direction to the jury to find accordingly, that notwithstanding the evidence in the case the accused was still presumed to be innocent.

The correct rule on the subject is that the accused is presumed to be innocent until his guilt is established by the evidence. He rests secure in that presumption of innocence until proof is adduced which establishes his guilt beyond a reasonable doubt. 4 Ency. Dig. Va. & W. Va. Rep., 75. There are many elaborations and explanations of this rule touching what is a reasonable doubt and bringing out other further distinctions making the rule applicable to particular cases, which are proper to be made in instructions in particular cases, as appears from the numerous decisions of this court on the subject, but none of them should have the effect of charging the jury that the presumption of innocence still adheres to the accused notwithstanding that the evidence in the case may establish his guilt beyond a reasonable doubt.

(b) As to the second instruction above quoted: There was no evidence in the case on which to base this instruction, if the record of the express company and the affidavits above referred to were admissible in evidence. (We will presently consider the latter question.) Such record and affidavits excluded every rational hypothesis of the in-

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nocence of the accused consistent with the evidence in the case.

(c) As to the third instruction above quoted: It is contended for the accused that this instruction should have been given, because—

(1c) The *corpus delicti* was not proved in the instant case, in this, that—

(1c[1]) The record of the express company and affidavits were not admissible in evidence until the *corpus delicti* was proved by other evidence than such records and affidavits;

(1c[2]) That the affidavits being admissions of the accused, were not admissible to prove the *corpus delicti;*

(1c[3]) That the admission of such record, made by strangers, who were not produced to testify, violated the constitutional right of the accused (Section 8, Virginia Constitution) "to be confronted with his accusers and witnesses;" and

(1c[4]) If admissible, such record and affidavit were insufficient to prove the *corpus delicti,* because the latter consisted in the fact that the substance shipped and received was distilled liquor and the only persons who could know such fact were the consignor, who sealed the package, and the consignee, who received and opened it, and (it is to be presumed) not the latter unless he tasted or otherwise made an actual test of it.

Now in regard to these positions (referring to them in their order as stated) it is deemed sufficient to say:

(1c) The *corpus delicti* in the instant case was the fact that some one person received delivery of whiskey in excess of one quart in quantity within a period of one calendar month, as charged in the indictment.

The express record alone in the instant case, if admissible, was *prima facie* evidence of that fact. Such record showed *prima facie* that some one person having the same name of the accused, received delivery of whiskey which

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constituted the *corpus delicti* in the instant case. In the absence of rebutting evidence such *prima facie* evidence became conclusive.

Direct evidence is not essential to prove the *corpus delicti* in any case. It may be proved as any other fact may be proved which is essential to establish the guilt of the accused, namely, by circumstantial evidence which produces "the full assurance of moral certainty" on the subject. *Nicholas' Case,* 91 Va., at p. 750, 21 S. E. at p. 367, and authorities therein cited.

(1c[1]) There is no merit in the position that the record of the express company and affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved. As stated in the opinion of the court in *Nicholas' Case, supra,* "If the contention of counsel was sound there could be no conviction upon circumstantial evidence." 91 Va. 750, 21 S. E. 366.

(1c[2]) There is no merit in this contention. Independent of statute, the admissions of the accused "are competent evidence tending to prove the *corpus delicti.*" *State* v. *Hall,* 31 W. Va. 505, 7 S. E. 422. In the absence of all other and corroborative evidence the admissions would be insufficient to establish the *corpus delicti;* but in the instant case the record of the express company furnished sufficiently corroborative evidence of the *corpus delicti.* (Such record was, indeed, sufficient independent of such fact, as above stated.) By said statute the affidavits are made *prima facie* evidence, and they are evidence, independent evidence of statute, as to all facts which they tend to prove which are material in the case, including the *corpus delicti.*

(1c[3]) No authority is cited to support this position, and there is no merit in it. The constitutional provision in question is as follows:

"Section 8 * * * That in all criminal prosecutions a

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man hath a right * * * to be confronted with the accusers and witnesses. * * *"

It is well settled that the constitutional provision quoted is not intended to exclude proper documentary evidence. *Bracey's Case,* 119 Va. 867, 89 S. E. 144; *Runde's Case,* 108 Va. 873, 61 S. E. 792; Bishop on Cr. Pr. (3d ed.), sections 1132-4. Documentary evidence is admissible in criminal as in civil cases, under the same rules which define and limit its admissibility.

Independent of statute, the express record was admissible in evidence, when properly authenticated, as a part of the *res gestae.* See authorities cited in 4 Ency. Dig. Va. & W. Va. Rep. 775; *Cluverius's Case,* 81 Va. 787, as to documentary evidence consisting of letters; *Coleman's Case,* 25 Gratt. (66 Va.) 865, 18 Am. Rep. 711, as to a public record. Further, under the rules of evidence provided by the prohibition statute in question, such record is expressly made admissible in evidence.

The affidavits were admissible in evidence under the rules applicable to the admissibility of documentary evidence, as confessions of the accused. See authorities cited in 4 Ency. Dig. Va. & W. Va. Rep. 778.

(1c[4]) This position is the same in substance as that above considered, to the effect that the *corpus delicti* cannot be proved by circumstantial evidence, but only by direct testimony of a witness or witnesses who have actual personal knowledge of such fact. As we have seen the *corpus delicti* may be proved as any other fact may be proved and that therefore such position is untenable. *Nicholas' Case, supra,* and authorities therein cited.

(d) As to the fourth instruction above quoted: This instruction involves the same position as that covered by question 3 above, and such position need not be further dealt with.

(e) As to the fifth and last instruction above quoted:

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This instruction involves the question whether section 40 of the said act creates the receipt and acceptance of delivery by transportation of ardent spirits in a quantity in excess of one quart within a period of one month a statutory offense, in addition to and different from the offenses created by the concluding sentence of such section. We are of opinion that such section does create such first named offense. This being true, that offense is punishable under section 5 of said act, and not under section 40 thereof, as predicated by the instruction under consideration, and hence the position taken in such instruction is untenable.

Therefore, we are of opinion that all of the said instructions were properly refused by the trial court.

6. The only remaining question raised by the assignments of error is whether there was error in the refusal of the trial court to set aside the verdict and judgment aforesaid and grant a new trial?

It is obvious from the statement of the evidence and facts, and from what is said above as to the law of the case, that there was no error in the refusal of the trial court to set aside the verdict and judgment and grant a new trial.

For the foregoing reasons, we are of opinion to affirm the judgment complained of.

Affirmed.

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Richmond.

STULTZ v. COMMONWEALTH.

November 15, 1917.

John W. Morrison and *Charles A. Hammer*, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile*, for the Commonwealth.

SIMS, J., delivered the opinion of the court.

The facts in the instant case are similar to those in the case of *Charles Cochran* v. *Commonwealth, ante*, p. 801, in which the opinion of this court is handed down at this term, and precisely the same questions are involved and decided, except that instruction No. 1 offered by the accused and refused by the trial court in *Cochran's Case* was not offered or given in the instant case. Hence the opinion in the former case is hereby adopted and referred to as the opinion in this case, with the single exception of what is said therein with respect to said instruction No. 1; and for the reasons given in such opinion the instant case is affirmed.

Affirmed.

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Syllabus.

Richmond.

ELLIS v. TOWN OF COVINGTON.

November 15, 1917.

1. SUNDAY—*Acts 1916, page 751, Amending Section 3799 of the Code of 1904—Violation a Misdemeanor.*—The act of Assembly, Acts 1916, page 751, re-enacting and amending section 3799, Code of 1904, makes the violation of the Sabbath day, as prohibited by the act, a misdemeanor, thereby changing the rule announced in *Wells* v. *Commonwealth*, 107 Va. 834, 57 S. E. 588, where it was held that under the former statute the transgression was not a misdemeanor, and the forfeiture thereby imposed could only be recovered by a civil warrant.
2. STATUTES—*Time of Taking Effect—Repeal—Abolition of Bill of Exceptions.*—The act of March 21, 1916 (Acts 1916, page 722), preserving bills of exception, was made an emergency act, and went into effect immediately and contained no repealing clause, whereas the act of March 21, 1916 (Acts 1916, page 708), abolishing bills of exception, was not an emergency act, and, by constitutional provision (Constitution 1902, section 53, article IV), did not take effect until ninety days after the adjournment of the legislature; and it expressly repealed all statutes in conflict with it. Consequently, there was no antagonism between the two statutes. The emergency act was operative at once, and continued in force during the interval between its passage and the time at which the act abolishing bills of exceptions took effect, when it was immediately repealed.
3. BILL OF EXCEPTIONS—*Construction of Act Abolishing.*—The act abolishing bills of exception, now in force (Acts 1916, page 708), was intended to simplify the procedure, and is very liberal in its provisions as to what shall constitute a sufficient certificate. While forms of certificates are prescribed by section 4 of the act, the next succeeding section declares, "that in all cases * * * it shall be sufficient that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with the provisions of this act." Other provisions of the act are equally liberal. The mere form of the exception, therefore, even a formal bill of

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exception under the former practice, will not prevent its consideration, if the provisions of the act are substantially complied with.

4. SUNDAY—*Sale of Coca-Cola.*—A Sunday ordinance of the town of Covington was substantially in the language of the act of Assembly (Acts 1916, page 751) amending and re-enacting section 3799 of the Code of 1904, and provided that, "If a person on the Sabbath day be found laboring at any trade or calling * * * except in household or other work of necessity, or charity, he shall be deemed guilty of a misdemeanor," etc.

Held: That the sale of soft drinks, including Coca-Cola, on Sunday, from a soda fountain by the holder of a restaurant license, was a plain violation of the ordinance. The defendant could not lawfully dispense soft drinks, even on a week-day, without license; and plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability under the ordinance.

Error to a judgment of the Circuit Court of Alleghany county, affirming a judgment of the mayor of the town of Covington imposing a fine for the violation of a city ordinance.

Affirmed.

The opinion states the case.

W. E. Allen, for the plaintiff in error.

R. C. Stokes, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

Plaintiff in error, Ellis, was convicted by the mayor of Covington for violation of a town ordinance in laboring at his trade or calling of selling Coca-Cola on the Sabbath day, and fined $5.00 and costs. On appeal the Circuit Court of Alleghany county sustained the conviction, and the case is here on writ of error to that judgment.

The ordinance in question is substantially in the lan-

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guage of the act of Assembly amending and re-enacting section 3799 of the Code, and declares that, "If a person on the Sabbath day be found laboring at any trade or calling * * * except in household or other work of necessity, or charity, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars for each offense * * * Provided that for the purpose of this act, the delivery on the Sabbath day of ice cream manufactured on some day other than the Sabbath day shall be construed as a work of necessity." Acts 1916, p. 751.

It may be noted that this amendment, making such violation of the Sabbath day a misdemeanor, changes the rule announced in *Wells v. Commonwealth,* 107 Va. 834, 57 S. E. 588, where it was held that under the former statute the transgression was not a misdemeanor, and the forfeiture thereby imposed could only be recovered by a civil warrant.

Objection is made to reviewing the judgment in this case on the ground that the evidence is not part of the record, though it is conceded that it was certified by the trial judge in accordance with an act approved March 21, 1916. (Acts 1916, p. 708.) Yet it is said the legislature passed another act on the same day, preserving bills of exceptions (Acts 1916, p. 722); and that the two enactments are incompatible and neutralize each other.

The situation is this: The act last referred to was made an emergency act, and went into effect immediately, while the first mentioned act was not an emergency act, and, by constitutional provision did not take effect until ninety days after the adjournment of the legislature (Const., sec. 53, art. IV); and it expressly repealed "all statutes or parts of statutes in derogation of, or in conflict with, the provisions of this act." The other act contained no repealing clause. In these circumstances, there was no antagonism between the two statutes. The emergency act was

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operative at once, and continued in force during the interval between its passage and the time at which the act abolishing bills of exceptions took effect, when it was immediately repealed. The act abolishing bills of exceptions, now in force, was intended, however, to simplify the procedure, and is very liberal in its provisions as to what shall constitute a sufficient certificate. While forms of certificates are prescribed by section 4 of the act, the next succeeding section declares, "that in all cases * * * it shall be sufficient that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with the provisions of this act." Other provisions of the act are equally liberal. The mere form of the exception, therefore, even a formal bill of exception under the former practice, will not prevent its consideration, if the provisions of the act are substantially complied with.

On the merits of the case, we have no difficulty in affirming the judgment. Ellis was carrying on two well defined trades or callings under separate licenses. (1) He was conducting an eating house, or restaurant, the exercise of which business on the Sabbath day, admittedly, was not a violation of the ordinance; and (2) he was engaged in selling soft drinks (including Coca-Cola) from a soda fountain, the sale of which on the Sabbath day is a plain violation of the ordinance. Such beverages, though not spirituous or alcoholic, cannot be dispensed without a license; and they constitute a distinct class from coffee, tea and other unlicensed drinks, which are commonly used at meals with food. His attempt to justify the infraction of the ordinance on the plea that he did not serve Coca-Cola alone, but only in connection with meals, lunches and pie when called for by customers, is a palpable subterfuge and constitutes no defense. Coca-Cola is not within the class of beverages covered by the eating house or restaurant license. If it were, obviously a separate license would not

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be necessary to authorize its sale. Ellis could not lawfully dispense soft drinks, even on a week-day, without license; and plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability under the ordinance.

The judgment is without error and is affirmed.

Affirmed.

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Richmond.

HUMMER AND COSTELLO v. COMMONWEALTH.

November 15, 1917.

1. INDICTMENT AND INFORMATION—*Alleging Constituents of Offense—Malice.*—All the constituents of the offense, whether of common law or statutory origin, for which an accused person is tried, must be set out in the indictment. This general principle necessarily applies where malice is an essential ingredient of the offense.

2. INDICTMENT AND INFORMATION—*Alleging Constituents of Offense—Malice—Case at Bar.*—Defendants were indicted upon the charge of having "unlawfully and feloniously" cut and wounded another. The indictments contained no charge of "malicious" cutting. After the prisoners had been arraigned and had each entered a plea of not guilty, the clerk read the indictments to the jury, and, in charging them as to the punishment for the alleged offense, read to them, over the objection of counsel, section 3671 of the Code of 1904. This section provides that if any person *maliciously* cuts or wounds another, with intent to maim, disfigure, disable, or kill, he shall be punished by confinement in the penitentiary not less than one nor more than ten years. But if the act be done unlawfully, but *not maliciously*, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars. The court also refused an instruction requested by counsel for defendants that under the indictment defendants could not be found guilty of *maliciously* cutting or stabbing.

   Held: That the court erred in permitting the clerk to read to the jury section 3671 without explaining to them that they were not to regard that portion of it which related to the punishment for maliciously doing the acts therein described; and, further, that it was error, in these circumstances, to refuse the instruction requested.

3. APPEAL AND ERROR—*Criminal Law—Harmless Error.*—Where both prisoners were convicted by the jury under instructions

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which permitted them to find the prisoners guilty of a higher offense, and one carrying a higher maximum and minimum punishment, than that with which they were charged, the error cannot be said to be harmless, where the jury did not impose the minimum penalty prescribed by the statute for the offense with which they were charged.

Error to a judgment of the Circuit Court of Clarke county.

Reversed.

The opinion states the case.

Marshall McCormick, for the plaintiffs in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile,* for the Commonwealth.

KELLY, J., delivered the opinion of the court.

Jeff Hummer and Weita Costello were separately indicted, but, by agreement, jointly tried, upon the charge of having "unlawfully and feloniously" cut and wounded one Henry Bean. The jury returned separate verdicts, finding both defendants guilty, fixing the punishment of Miss Costello at a nominal fine and three months in jail, and that of Hummer at one year in the penitentiary. The circuit court sentenced them accordingly, and the case is here upon a writ of error.

The indictments contained no charge of "malicious" cutting. After the prisoners had been arraigned and had each entered a plea of not guilty, the clerk read the indictments to the jury, and, in charging them as to the punishment for the alleged offense, read to them section 3671 of the Code, which is as follows:

"If any person maliciously shoot, stab, cut, or wound any person, or by any means cause him bodily injury, with

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intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars."

This section, in its entirety and without qualification, was read to the jury over the objection of counsel for the prisoners, the objection being "that the indictment in both of these cases was only for unlawful cutting and not for malicious cutting, and therefore that the only part of section 3671 which related to these cases was the last clause which declared the punishment for unlawful cutting."

At the conclusion of the testimony on both sides, counsel again sought to have the jury informed that, upon the indictments before them, they could not find the prisoners guilty of malicious cutting, and to this end offered the following instruction, which, however, the court refused:

"The court instructs the jury that under the indictment in this case they cannot find the defendant, Jeff Hummer, or the defendant, Weita Costello, guilty of maliciously cutting or stabbing as described in the indictment for the reason that neither of the defendants are charged with doing the act maliciously."

It is settled and familiar law that all the constituents of the offense, whether of common law or statutory origin, for which an accused person is tried, must be set out in the indictment. Minor's Synopsis Crim. Law, p. 253, and cases cited. This general principle necessarily applies where malice is an essential ingredient of the offense. If citation of authority for this proposition be necessary, see 22 Cyc. 330; *Sarah* v. *State*, 28 Miss. 267, 61 Am. Dec. 544, 550.

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It is clear, therefore, that the court erred in permitting the clerk to read to the jury section 3671 without explaining to them that they were not to regard that portion of it which related to the punishment for maliciously doing the acts therein described; and, further, that it was error, in these circumstances, to refuse the instruction set out above.

Nor can we say that the error was harmless. Both prisoners were convicted by the jury under instructions which permitted them to find the prisoners guilty of a higher offense, and one carrying a higher maximum and minimum punishment, than that with which they were charged. The ruling of the court upon the reading of section 3671, was made in the presence of the jury. The refusal of the instruction subsequently offered, and other circumstances appearing in the record, indicate that the court was fixed in the mistaken opinion that there could lawfully be, under these indictments, a conviction for malicious cutting. The atmosphere of the trial was thus necessarily charged with an erroneous view as to the character of the offense and the extent of the punishment. If the jury had imposed the minimum penalty prescribed by the statute for unlawful cutting, then we might well say that the error was harmless; but they did not do this as to either prisoner. It is true that the punishment actually imposed on Miss Costello brought her offense within the class of unlawful, but not malicious, assaults, and that the punishment actually imposed upon Hummer did not reach the maximum which the statute fixes for assaults of that character. Both verdicts might, however, have been legally rendered under an indictment charging malice (*Montgomery's Case,* 98 Va. 840, 843, 36 S. E. 371); and we cannot say that the jury was uninfluenced by the action of the court in permitting them to try the prisoners for malicious cutting instead of confining them to the charge of unlawful cutting

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as set out in the indictment. The seriousness of the charge and the range of the punishment may naturally and reasonably be expected to impress, in greater or less degree, the individual judgment and conscience of the jurors, and thus have some material effect upon the composite result of their deliberations as expressed in their verdict. The Commonwealth charged these defendants with an unlawful and felonious, but not with a malicious act. They had an absolute and constitutional right to be tried accordingly. They did nothing to waive this right, but upon the contrary did all in their power to preserve and enforce it.

The decisions of this court in *Mitchell's Case*, 75 Va. 856, and *Whitlock's Case*, 89 Va. 337, 15 S. E. 893, are invoked on behalf of the Commonwealth, to meet the difficulty in the instant case. In *Mitchell's Case* the clerk's charge was erroneous as to the minimum penalty, but the jury fixed the maximum, and it was very properly held that the accused had not been prejudiced. In *Whitlock's Case* the charge was erroneous as to the maximum penalty, but the verdict was for the minimum, and it was held with equal propriety that the error was harmless. Neither of these cases are applicable here.

The other errors assigned are not likely to arise at the next trial, except in so far as they involve the sufficiency of the evidence to warrant a conviction, and upon this question we express no opinion.

The judgments complained of will be reversed, the verdicts of the jury set aside, and the causes remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

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Richmond.

KENNAN V. COMMONWEALTH.

November 15, 1917.

1. INDICTMENT AND INFORMATION—*Insufficiency of Indictment.*—When the indictment may be true, and yet the defendant is not necessarily guilty of the offense charged, it is insufficient.
2. INTOXICATING LIQUORS—*Prohibition Act—Indictment—Time of Offense.*—At the January term, 1917, of the Circuit Court of Clarke county, an indictment was found against defendant charging that he "did within one year last past preceding the finding of the indictment unlawfully give away ardent spirits." The charge in the indictment that the defendant did unlawfully give away ardent spirits within one year next prior to the finding of the indictment, embraces a period of time anterior to November 1, 1916, after which date the prohibition act by its terms went into effect. Previous to that time it was not necessarily unlawful to give away ardent spirits. Therefore, in such case, time was of the essence of the offense; and it was essential for the indictment to charge that the gift of ardent spirits imputed to the defendant occurred after the act became operative, and not before that time, although within one year prior to the finding of the indictment.

Error to a judgment of the Circuit Court of Clarke county.

Reversed.

The opinion states the case.

A. Moore, Jr., & Son, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., Leslie C. Garnett, and *Leon M. Bazile,* for the Commonwealth.

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WHITTLE, P., delivered the opinion of the court.

At the January term, 1917, of the Circuit Court of Clarke county, the grand jury returned an indictment against the plaintiff in error, James Kennan, which, omitting the formal parts, was as follows: "That James Kennan within one year next prior to the finding of this indictment in the county of Clarke did unlawfully sell, give away, offer, dispense, expose, keep and store for sale, and give ardent spirits, and within said time did have in his possession in said county at the same time two quarts of whiskey against the peace and dignity of the Commonwealth of Virginia."

The prosecution was had under the prohibition act, ch. 145, Acts 1916, p. 215, which became operative after November 1, 1916. The Commonwealth elected to try the accused on the charge that he "did within one year last past preceding the finding of the indictment unlawfully give away ardent spirits." Whereupon the defendant moved the court to quash the indictment, which motion was overruled, and to which action of the court overruling his motion the defendant duly excepted.

On the trial of the case, upon the plea of not guilty, the jury found the defendant guilty and imposed upon him a fine of $50.00 and thirty days' imprisonment in the county jail; and the court having overruled the defendant's motion to set aside the verdict and grant him a new trial on the ground that the verdict was without law to support it (which ruling was likewise made the subject of exception) proceeded to render judgment against defendant in accordance with the verdict.

There are several assignments of error, but the only assignment which demands notice is to the action of the court overruling the defendant's motion to quash the indictment.

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It will be observed that the charge in the indictment that the defendant did unlawfully give away ardent spirits within one year next prior to the finding of the indictment, embraces a period of time anterior to November 1, 1916, after which date the prohibition act by its terms went into effect. Previous to that time it was not necessarily unlawful to give away ardent spirits. Therefore, in such case, time was of the essence of the offense; and it was essential for the indictment to charge that the gift of ardent spirits imputed to the defendant occurred after the act became operative, and not before that time, although within one year prior to the finding of the indictment. When the indictment may be true, and yet the defendant is not necessarily guilty of the offense charged, it is insufficient. *Hampton's Case,* 3 Gratt. (44 Va.) 590; *Commonwealth* v. *Young,* 15 Gratt. (56 Va.) 664; *Boyd* v. *Commonwealth,* 77 Va. 52; *Cool* v. *Commonwealth,* 94 Va. 799, 26 S. E. 411; *White* v. *Commonwealth,* 107 Va. 901, 59 S. E. 1101; *Wiseman* v. *Commonwealth,* 117 Va. 906, 83 S. E. 1052; *Blair* v. *Commonwealth, ante* p. 798, 94 S. E. 185, in which an opinion was handed down at the present term. The indictment in the present case is violative of the principle enunciated by the foregoing authorities, and ought to have been quashed.

For these reasons the judgment must be reversed, and this court will enter such judgment as the circuit court ought to have rendered, quashing the indictment and discharging the plaintiff in error from further prosecution thereunder.

Reversed.

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Richmond.

ALLEN v. COMMONWEALTH.

January 24, 1918.

1. LARCENY—*Variance.*—Accused was convicted of grand larceny under an indictment containing a count charging him with the larceny of a check. In the count all the material parts of the check, the names of the drawer and drawee, the amount thereof, its date, and the bank upon which it was drawn, fully appeared. The number of the insurance policy, in settlement of which the check was given, was stated as 4660037, whereas the true number was 46600371. Having craved oyer of the check, the accused moved to quash the count, because of this variance.

   Held: That the court properly overruled this motion on the ground that the variance was immaterial.

2. INDICTMENT AND INFORMATION—*Joinder of Offenses—Alleging Distinct Felonies in Same Indictment.*—Distinct felonies may be charged in different counts in the same indictment, and the same felony may be charged in different ways in several counts, so as to conform to the evidence as it may develop at the trial.

3. INDICTMENT AND INFORMATION—*Several Offenses Charged in Different Counts of the Indictment—Election by Commonwealth.*—Where in cases of felony several offenses are charged, in sundry counts of the same indictment, if the court sees that the charges are so distinct that to try them together would confound the prisoner, or distract the attention of the jury, it will require the Commonwealth's attorney to select which count he will try first.

4. LARCENY—*Indictment and Information—Ownership Alleged in Different Persons.*—The ownership of the alleged stolen property may be averred to be in different persons in different counts of the indictment.

5. LARCENY—*Indictment and Information—Distinct Felonies—Bill of Particulars.*—An indictment for larceny charged in one count the larceny of a check for a certain amount, the property of another person, under section 3708, Code of 1904, and in another count the larceny of that amount of money, the

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property of the same person. The accused moved the court to require the Commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check.

Held: That the court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged.

6. LARCENY—*Evidence.*—In a trial for the larceny of a check given by an insurance company in settlement of a policy, accused claimed to have paid the proceeds of the check to an undertaker for burial expenses of the assured. A witness for the Commonwealth, an officer of the insurance company, over the objection of accused, was allowed to testify that the insurance company had never made any requirement as to funeral expenses of the assured. The trial court had instructed the jury that, if they believed that the accused had in good faith paid to the undertaker the amount which he claimed for the burial of the assured, then the accused was not guilty.

Held: That there was no error in overruling accused's objection to this testimony, although a clause of the policy in evidence provided that the insurance company might pay the amount due under the policy to any person appearing to the company to be entitled to the same by reason of having incurred expense for the burial of the assured.

7. WITNESSES — *Impeachment — Cross-Examination — Independent Facts.*—It is competent, in order to discredit a witness, to offer evidence attacking his character for truth and veracity. Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose. No question respecting any fact irrelevant to the issue can be put to a witness on cross-examination for the mere purpose of impeaching his credit by contradicting him. And if any such question be inadvertently put and answered, the answer of the witness will be conclusive.

8. WITNESSES — *Impeachment — Cross-Examination — Independent Facts—Case at Bar.*—In a trial for the larceny of a check given by an insurance company in settlement of a policy, accused claimed to have paid the proceeds of the check to an undertaker for burial expenses of the assured. The undertaker testified that although the cost of burial was only $23.50, nevertheless, at the request of the accused, he made out and receipted a bill to him for $71.50, for such burial. Attorney

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for the accused then asked the undertaker if it was not a fact that when his buggy had been damaged by another and the bill for its repair was $6.00, he had not asked the person repairing the buggy to raise it to $12.00, and collected the $12.00 for damages.

Held: That there was no error in sustaining the Commonwealth's objection to this last question.

9. WITNESSES — *Impeachment — Cross-Examination — Independent Facts.*—The test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether or not the cross-examining party would be entitled to prove it in support of his case.

10. DOCUMENTARY EVIDENCE—*Admissibility of Books of Account.*—The admission of books of account, the entries having been made by the bookkeeper under the direction of some one familiar with the facts at or near the time of the transaction, in the usual course of business, is clearly proper and everywhere accepted.

11. INDICTMENT AND INFORMATION—*Election Between Counts.*—The first count of an indictment for larceny charged the accused with the larceny of a check for $76.70, alleged to be the property of V., who was the payee of such check; the second count charged the larceny of that amount of money belonging to the said V.; and the last two counts were identical with the first two, except that the check, which was drawn by an insurance company, as well as the money, were alleged to be the property of that company. The accused asked the court to require the Commonwealth to elect on which count of the indictment it would ask for a conviction. It appeared from the Commonwealth's evidence that there was in reality a single connected transaction, commencing with the change in the policy on the life of C., induced by the accused, so as to make the benefit payable to V., followed some fifteen months later by the death of the assured, the making out of the claim for the insurance in the name of V. by the accused, and the receipt by him of the check payable to V., its endorsement by him in the name of V., and his collection and appropriation of a large part of the money. All of the evidence submitted was pertinent to this alleged sequence of facts, and each of these facts had relation to all of the others.

Held: That the court properly refused to require the Commonwealth to elect.

12. INDICTMENT AND INFORMATION — *Election Between Counts.* — Compelling of an election pertains not to absolute law but to judicial discretion. Ordinarily, therefore, the decision of the

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presiding judge, granting or refusing it, is not open to revision by the higher tribunal.

13. INSTRUCTIONS—*Multiplicity of Instructions.*—Where instructions given by the court at the instance of accused and the Commonwealth, fully and fairly presented every question involved in the case, the court rightly refused to add other instructions offered by the accused, the tendency of which would only have been to confuse and mislead the jury.

14. CRIMINAL LAW—*New Trial—Discretion of Court—Disqualification of Juror.*—The trial court has a discretion when a motion for a new trial is made on the ground of a statement of a juror prior to the trial showing extreme prejudice against the accused, subject to review by the appellate court, which will not be interfered with unless it appears that some injustice has been done.

Error to a judgment of the Hustings Court of the city of Petersburg.

Affirmed.

The opinion states the case.

L. O. Wendenburg, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile*, for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

The plaintiff in error was convicted of grand larceny under an indictment, the first count of which charges him with the larceny of a check for $76.70, alleged to be the property of Emma Vaughan, who was the payee of such check; the second count charges the larceny of that amount of money belonging to the said Emma Vaughan; and the last two counts were identical with the first two, except that the check, which was drawn by the Metropolitan Life Insurance Company, as well as the money, were alleged to be the property of that company.

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The accused filed fourteen bills of exceptions, but as several of them cover substantially the same propositions of law, presented at different stages of the trial, it will not be necessary to discuss each of them in detail.

The first exception is that there is a variance between the check and its description in the first and third counts of the indictment. This variance consists of the omission of the last figure in the number of the policy of insurance, in settlement of which the check was given; the true number being 46660371, whereas the number stated was 4666037. After having craved oyer of the check, the accused moved to quash the counts, because of this variance. We think the court properly overruled this motion, and that the variance was immaterial. The material parts of a check are the names of the drawer and drawee, the amount thereof, its date, and the bank upon which it is drawn. In this indictment all of these material parts of the check fully appear, as well as certain other marks upon it, clearly identifying it as the check drawn by the insurance company, the larceny of which was charged. The number of the policy appearing on the face of the check added nothing to its legal effect as a check, and was only useful to the company as a receipt for claims or demands under that particular policy. The accused could not have been surprised, prejudiced or put to any disadvantage whatever in his defense by this clerical error in drawing the indictment.

The accused also moved to quash the entire indictment because of a misjoinder, alleging that there were several distinct felonies charged in the various counts of the indictment. Even if this had been true, the motion should have been overruled, because distinct felonies may be charged in different counts. In this case, however, it was perfectly apparent that only one larceny was being charged, that the four counts referred to the same transac-

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tion, and were drawn in order to meet varying phases of the proof or differences of opinion as to whether the money and check belonged to the insurance company or to Emma Vaughan, the payee. It is conceded by counsel for the plaintiff in error that the ownership of the alleged stolen property may be averred to be in different persons in different counts of the indictment, and the motion to quash was properly overruled.

In *Mitchell* v. *Commonwealth*, 93 Va. 777, 20 S. E. 892, this is said: "In cases of felony, where several offenses are charged, in sundry counts of the same indictment, if the court sees that the charges are so distinct that to try them together would confound the prisoner, or distract the attention of the jury, it will require the Commonwealth's attorney to select which count he will try first."

It is well settled that a felony may be charged in different ways in several counts, so as to conform to the evidence as it may develop at the trial. *Dowdy's Case*, 9 Gratt. (50 Va.) 727, 60 Am. Dec. 314; *Hausenfluck's Case*, 85 Va. 709, 8 S. E. 683; *Anthony* v. *Commonwealth*, 88 Va. 847, 14 S. E. 834.

The accused also moved the court to require the Commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check under the statute (Code, sec. 3708). The court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged.

Another error alleged grows out of this question and answer: The witness, C. E. Hayes, who was the section head in the claim department of the Metropolitan Life Insurance Company, had identified the life insurance policy

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on the life of Indiana Cates, as well as certain other documentary evidence connected therewith, and was asked this question by the Commonwealth's attorney: "From the papers in this case, Mr. Hayes, is there anything there to show that the company made any requirements about funeral expenses?" The answer was: "No, sir, not in the papers I have here." The defendant objected to this answer because the policy had this clause in it: "In case of such prior death of the insured, the company may pay the amount due under this policy to either the beneficiary named below, or to the executor or administrator, husband or wife, or any relative by blood, or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial, and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied." The court overruled the objection and allowed the question and answer to go before the jury.

It is difficult to appreciate the force of this exception. It clearly appeared in the testimony that the company had never made any requirement as to funeral expenses of Indiana Cates, and the clause in the policy above quoted was before the jury as a part of the evidence in the case. The court also gave instructions 12 and 12-a, telling the jury that if they believed that the accused had in good faith paid to the undertaker, Epps, the amount which he claimed to have paid him out of the insurance money collected for the burial of the assured, then the accused was not guilty of the larceny of either the property of the insurance company or the property of Emma Vaughan. We find no error in this ruling.

Another error alleged is that after J. M. L. Epps, the undertaker who had buried the assured, Indiana Cates, and

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who had testified that although the cost of burial charged to the Metropolitan Life Insurance Company or to the accused was only $23.50, nevertheless, at the request of the accused, he had made out and receipted a bill to him for $71.50, for such burial, then for the purpose of attacking the credibility of the witness, on cross-examination, the attorney for the accused asked him this question: "Isn't it a fact that you had your buggy injured by a gentleman on the outside, and that you had it repaired at J. A. Lewis's, and that he handed you a bill for $6.00, and you asked him to raise it to $12.00, so that you could get the entire $12.00, and that you did collect the $12.00, although the repairs were only $6.00?" The Commonwealth's attorney objected to this question, and his objection was sustained.

This is a question about which there has been great contrariety of decision in the English and American courts. The doctrine most generally accepted now is that such a question on cross-examination as to irrelevant collateral matters tending to show immoral character, affecting the credibility of the witness under cross-examination, should be left to the discretion of the court in the particular case. It is everywhere settled that the cross-examiner who asks such a question is bound by the witness' answer and cannot introduce evidence to contradict him.

In 40 Cyc., 2569-70, the modern authorities are collected. Among other things, it is there said: "Neither should the door be thrown open so wide for impeaching evidence as to allow questions to be asked upon the pretense that the object is impeachment when there is no reasonable ground to expect favorable answers, or to be able to prove by direct evidence that the unfavorable ones are false and the sole tendency, if not the purpose, is to create suspicion in the minds of the jury."

In this State it may be regarded as settled that such questions cannot be asked. In *Uhl's Case*, 6 Gratt. (47

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Va.) 706, it was held that the record of conviction of a witness of petty larceny, in another State, is not admissible to impeach the veracity of the witness. In *Langhorne's Case*, 76 Va. 1021, the court says: "It is competent, in order to discredit a witness, to offer evidence attacking his character for truth and veracity. Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose. 1 Whart. Law of Ev., sec. 562. No question respecting any fact irrelevant to the issue can be put to a witness on cross-examination for the mere purpose of impeaching his credit by contradicting him. And if any such question be inadvertently put and answered the answer of the witness will be conclusive. 2 Taylor on Evidence, sec. 1435. The same doctrine is enunciated by Greenleaf. He says: 'In general, the rule is that upon examination to try the credit of the witness only general questions can be put; and he cannot be asked as to any collateral independent fact merely with a view to contradict him afterwards by calling another witness. And (he says) only general questions can be put.' Greenleaf on Evidence, 455.'" In *Cutchin* v. *Roanoke*, 113 Va. 452, 74 S. E. 403; *Uhl's Case*, *supra*, and *Langhorne's Case*, *supra*, are approved.

The test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether or not the cross-examining party would be entitled to prove it in support of his case. *State* v. *Goodwin*, 32 W. Va. 177, 9 S. E. 85; *State* v. *Sheppard*, 49 W. Va. 582, 39 S. E. 676.

The accused excepted to the introduction of testimony of the bookkeeper of Epps, the undertaker, and his account book indicating that only $23.50 had been paid by the accused for the burial expenses of Indiana Cates, such entry having been made within three or four days after the transaction by direction of Epps and in the usual course of business. There is no merit in this objection. The admis-

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sion of books of account, the entries having been made by the bookkeeper under the direction of some one familiar with the facts at or near the time of the transaction, in the usual course of business, is clearly proper and everywhere accepted. 1 Elliott on Evidence, secs. 459-461; Greenleaf on Evidence (16 ed.), p. 206; Wigmore on Evidence, sec. 1555.

The accused also asked the court to require the Commonwealth to elect on which count of the indictment it would ask for a conviction, which the court refused to do.

Bishop says, that the "compelling of an election pertains not to absolute law but to judicial discretion. Ordinarily, therefore, in most of our States, the decision of the presiding judge, granting or refusing it, is not open to revision by the higher tribunal." Bishop on Cr. Procedure, Vol. 1, sec. 425.

In this case the court properly refused to require the Commonwealth to elect. It appeared from the Commonwealth's evidence that there was in reality a single connected transaction, commencing with the change in the policy on the life of Indiana Cates, induced by the accused, so as to make the benefit payable to Emma Vaughan, followed some fifteen months later by the death of the accused, the making out of the claim for the insurance in the name of Emma Vaughan by the accused, and the receipt by him of the check payable to Emma Vaughan, its endorsement by him in the name of Emma Vaughan, and his collection and appropriation of a large part of the money. All of the evidence submitted was pertinent to this alleged sequence of facts, and each of these facts had relation to all of the others. *Dowdy* v. *Commonwealth, supra; Lewis* v. *Commonwealth,* 120 Va. 875, 91 S. E. 174; *Pine and Scott* v. *Commonwealth,* 121 Va. 812; 93 S. E. 653; *Pointer* v. *United States,* 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 211.

The facts of the case, considered as upon a demurrer to

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the evidence are: That the accused, who was the superintendent at Petersburg of the Metropolitan Life Insurance Company, about fifteen months before the death of Indiana Cates, procured a change in the name of the beneficiary under a policy in the company held by her, whereby Emma Vaughan, who at that time was a servant in the office of the company in Petersburg under the direction of the accused, was made the beneficiary. He wrote a letter, in effect saying, that the assured had only two children, one of whom was a fugitive from justice, and that she did not know where the other one was; that she wanted the policy made payable to Emma Vaughan, who would look after her in her feebleness. After her death, the accused made out the claim in the name of Emma Vaughan, and received the check for $76.50 from the company's office in New York, payable to Emma Vaughan. He endorsed this check in the name of Emma Vaughan, collected the money thereon, and appropriated all but $23.50 of it to his own use. It afterwards appeared that Indiana Cates had four children, one of whom lived with his wife within two doors of her residence in the city of Petersburg; that she had a daughter in Danville, and a son who had lived at McKinney, twenty-five or thirty miles south of Petersburg, for two years prior to her death, who before that time had lived in Petersburg. All of the documents which required Emma Vaughan's signature were signed with the name of Emma Vaughan by the accused, he making her mark and witnessing her signature, and thus the check was endorsed, It appeared from Emma Vaughan's testimony that she did not know Indiana Cates, or any of her children; and that she never heard of the transaction until after the money had been collected by the accused; and that she had never received any of it. It also clearly appeared that Emma Vaughan could write her own name, and that she had written it in connection with an application for insurance

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in this company, which had passed through the hands of the accused. He procured the undertaker to give him a receipted bill for $71.50 for the funeral expenses of Indiana Cates, while in fact he only paid $23.50. All of these incriminating facts were denied by the accused and his witnesses. Under these circumstances, the verdict of the jury, sanctioned by the trial court is fully justified by the evidence, considered here as upon a demurrer to the evidence, and under the statute cannot be disturbed by this court.

The accused excepted to the refusal of the court to grant a number of instructions. It is sufficient to say as to these exceptions, that the court granted eight instructions at his instance, which sufficiently presented his defense, and nine at the instance of the Commonwealth, presenting the opposing view. These instructions fully and fairly presented every question involved, and the court rightly refused to add the other instructions offered by the accused, the tendency of which would only have been to confuse and mislead the jury.

After the case had been tried, the accused filed an affidavit which shows that there had been two trials of the case, and that one of the jurors who concurred in the verdict of conviction, during the pendency of the first trial, had made a statement showing extreme prejudice against the accused, to the effect that if he served as a juror he would give the accused "every year that he could," and asked the court to set aside the verdict and grant him a new trial for this reason. The question thus raised has been frequently considered by the courts.

In *Bristow's Case*, 15 Gratt. (56 Va.) 648, this is said: "To permit prisoners to avail themselves, after verdict, of pre-existing objections to the competency of jurors, as a matter of right, would not only be unreasonable, but most mischievous in its consequences. The delays in the administration of criminal justice, and the chances for the escape

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of the guilty, would be greatly increased. Proper verdicts, especially in trials for grave offenses, would be continually set aside. A prisoner knowing, or wilfully remaining ignorant of the incompetency of a juror, would take the chances of a favorable verdict, with him upon the jury; and if the verdict should be adverse, would readily enough make the affidavit necessary to avoid its effect." *Poindexter's Case*, 33 Gratt. (74 Va.) 766; *Hite's Case*, 96 Va. 495, 31 S. E. 895.

In *Beck* v. *Thomson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870, this is said: "A new trial will not be granted on account of the disqualification of a juror for matter that is a principal cause of challenge, which existed before he was elected and sworn as such juror, but which was unknown to the party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appears from the whole case, made before the court on the motion for a new trial, that the party suffered injustice from the fact that such juror served upon the case." *Jones' Case*, 1 Leigh (28 Va.) 598; *Heath's* [illegible] (4 Va.) 503; *Carrol's Case*, 7 Gratt. (48 Va.) 623, referring to *Smith's Case*, 2 Va. Cas. (4 Va.) 6; *Poore's Case*, 2 Va. Cas. (4 Va.) 474; *Kennedy's Case*, 2 Va. Cas. (4 Va.) 510; *Brown's Case*, 2 Va. Cas. (4 Va.) 516; *Hughes' Case*, 5 Rand. (26 Va.) 655; *Jones' Case*, *supra*, and *Hailstock's Case*, 2 Gratt. (43 Va.) 564; *Simmons & Winch* v. *McConnell*, 86 Va. 500, 10 S. E. 838; *Reynolds* v. *Richmond, etc., R. Co.*, 92 Va. 407, 23 S. E. 770; *Doyle* v. *Commonwealth*, 100 Va. 812, 40 S. E. 925. The trial court has a discretion when such motions are presented, subject to review by this court, which will not be interfered with unless it appears that some injustice has been done. Code, sec. 3156.

For the reasons here indicated, the judgment will be affirmed.

Affirmed.

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Syllabus.

Richmond.

BURTON V. COMMONWEALTH.

January 24, 1918.

1. INTOXICATING LIQUORS—*Prohibition Act—Indictment—Transportation—"For Use in This State"—"For Sale."*—Accused was indicted under section 39 of the prohibition act (Acts 1916, page 215) for personally and at one time bringing into the State, and also for personally and at one time transporting from one point to another within the State ardent spirits in excess of the quantity of one quart allowed by that section of the act. There were two counts in the indictment, neither of which contained any allegation to the effect that the liquor in question was "for use in this State."

   Held: That the indictment was not insufficient because of the lack of this allegation, as under section 39, neither as to the offense of the bringing of the liquor into this State, nor as to the transportation of it within the State, is it an essential ingredient of the offense that the liquor must be "for use in this State;" nor was the indictment insufficient because it lacked an allegation that the liquor in question was brought into this State, or transported from one point to another within this State, "for sale," the statute not providing that the liquor in question must be brought into the State "for sale," or transported from one point to another within the State "for sale," in order to create either of the offenses.

2. STATUTES—*Title—Prohibition Act.*—Section 39 of the prohibition act is not unconstitutional as violative of section 52 of the Constitution of Virginia, because the body of the act in regard to "transportation" of ardent spirits is broader than its title, in that the title is confined in its reference to "transportation" to "transportation for sale."

3. STATUTES—*Title—Prohibition Act.*—The regulation of the bringing into this State and of transporting from one point to another within the State of ardent spirits is certainly germane and in furtherance of the "enforcement" of the statute in respect to its regulation of the use and its prohibition of the keeping of ardent spirits for sale. While this is not so obviously true of the prohibition of the sale of ardent spirits, falling under the ban of the statute, it is essentially true of

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that also. Without regulation of the transportation of ardent spirits, the illicit sale thereof cannot be efficiently prevented. Hence, such regulation may be said to be not only germane and in furtherance of the enforcement of the statute, but that it is essential to its enforcement.

4. REASONABLE DOUBT—*Reasonable Doubt as to which of Two Persons Committed the Offense.*—When two persons had the same opportunity to commit the offense, and if upon the whole evidence in the case there remains a reasonable doubt as to which of the two committed it, neither of the two can be convicted.

5. INSTRUCTIONS—*Reasonable Doubt.*—Where it appeared from the record that there was evidence in the case which tended to show that the accused did not bring the liquor in question into this State or transport it from one point to another within the State; but that another person, not indicted and absent from the State at the time of the trial, brought the liquor into the State, it was error to refuse an instruction that if there was a reasonable doubt as to which of the two committed it, "neither of the two can be convicted," the instruction being the same in effect as if it had concluded, "the accused cannot be convicted," in lieu of the language, "neither of the two can be convicted."

Error to a judgment of the Circuit Court of Northampton county.

Reversed.

The opinion states the case.

Stanley Scott and *Louis S. Sacks*, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile*, for the Commonwealth.

SIMS, J., delivered the opinion of the court.

The accused was indicted under section 39 of the prohibition act (Acts 1916, p. 215) for personally and at one time bringing into the State, and also for personally and at one time transporting from one point to another within

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the State, ardent spirits in excess of the quantity of one quart allowed by that section of such act.

There are two counts in the indictment, which, omitting the formal parts, are as follows:

First Count. "* * * that Arthur Burton, in said county on the ...day of April, A. D., 1917, did unlawfully bring into the State of Virginia ardent spirits, to-wit, 15 quarts of distilled liquor * * *"

Second Count. "* * * that Arthur Burton, in said county, on the ... day of April, A. D., 1917, did unlawfully transport from a point in the State of Virginia to another point in said State of Virginia, ardent spirits, to-wit, 15 quarts of distilled liquors * * *"

It will be noted that neither count of the indictment contains any allegation to the effect that the liquor in question was "for use in this State."

There was a demurrer to the indictment, and to each count thereof, which was overruled by the trial court. Of the questions raised by the grounds of demurrer, all except three have been recently decided by the opinions of this court in other cases, and so need no further consideration by us. The three questions referred to, which should be dealt with by us in the instant case, will be considered and passed upon in their order as stated below.

1. Is the indictment insufficient because of its lack of allegation that the liquor in question was "for use in this State?"

Both counts of the indictment were under section 39 of the statute as shown by the statutory language used in the indictment. It is true that the first part of this section couples with the language creating the offense of bringing liquor into this State (which is the subject of the first count of the indictment) the qualification that such bringing must be "for use in this State;" but the provision on this subject in the latter part of the same section makes it plain

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that such qualification is not made by the statute an essential ingredient of the offense. The latter provision is as follows: "It shall be unlawful for any person to bring into this State from any point without the State, whether in his personal baggage or otherwise, within a period of thirty days, more than one quart of ardent spirits * * *"

As to the transportation within the State (which is the subject of the second count of the indictment) the language of section 39, which creates that offense, plainly does not make the qualification "for use in this State" an ingredient of that offense. That language is as follows: "No person * * * shall * * * transport from one point to another in this State * * * any ardent spirits."

Therefore, under the rule on the subject too well settled to need restatement here, neither as to the offense of the bringing of the liquor into this State, nor as to the transportation of it within the State, was the qualification that it must be "for use in this State" an essential ingredient of the offenses charged, and hence both of the counts were good without the allegation that the liquor in question was "for use in this State." *Pine and Scott's Case,* 121 Va. 812, 93 S. E. 652; *Whitlock's Case,* 89 Va. 337, 15 S. E. 893; *Benton's Case,* 91 Va. 782, 793, 21 S. E. 495.

2. Is said section 39 of said act unconstitutional, in that it violates section 52 of the Constitution of Virginia, because the body of the act in regard to "transportation" of ardent spirits is broader than its title, in that the title is confined in its reference to "transportation" to "transportation for sale?"

It is true that the title to the act in its reference to transportation is confined to "transportation *for sale,*" but there are other objects of the statute than the prohibition of the transportation for sale, among which are the prohibition of the "use," and "keeping for sale" of ardent spirits "except as provided" therein, and the "sale" of ardent spirits,

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which are expressly embraced in the title of the statute. The title also expressly sets forth that one of the objects of the statute is "to provide for the enforcement of this act." The regulation of the bringing into this State and of transporting from one point to another within the State of ardent spirits is certainly germane to and in furtherance of the "enforcement" of the statute in respect to its regulation of the use and its prohibition of the keeping of ardent spirits for sale. While this is not so obviously true of the prohibition of the sale of ardent spirits, falling under the ban of the statute, it is essentially true of that also. Without regulation of the transportation of ardent spirits, the illicit sale thereof cannot be efficiently prevented. Hence, such regulation may be said to be not only germane and in furtherance of the enforcement of the statute, but that it is essential to its enforcement, as we stated in substance in *Cochran's Case, ante,* p. 801, 94 S. E. 329, on the same question now under consideration, which arose in that case in connection with section 40 of said act. Our conclusion, therefore, is that section 39, aforesaid, is not amenable to the constitutional objection indicated in the question now under consideration.

3. Is the indictment in the instant case insufficient because of its lack of allegation that the liquor in question was brought into this State or transported from one point to another within this State *"for sale?"*

Section 39 of the statute, under which, as above stated, we are of opinion that the indictment was found, does not provide that the liquor in question must be brought into the State "for sale," or transported from one point to another within the State "for sale," in order to create either of such offenses. Hence, the qualification of the acts in question that they must be "for sale" is not an essential ingredient of such statutory offenses, or of either of them. Therefore, under the rule on the subject, above referred to, we are of

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opinion that the indictment was not insufficient because of its lack of the allegation which is the subject of the question under consideration.

This brings us to the consideration of the sole remaining question in the case which is—

4. Was it error for the trial court to refuse, as it did, to give instruction 5, asked for by the accused?

That instruction was as follows:

"Instruction No. 5. The jury are instructed that when two persons had the same opportunity to commit the offense, and if upon the whole evidence in the case there remains a reasonable doubt as to which of the two committed it, neither of the two can be convicted."

It appears from the record that there was evidence in the case which tended to show that the accused did not bring the liquor in question into this State or transport it from one point to another within the State; but that another person, not indicted and absent from the State at the time of the trial, brought the liquor into this State. Such being the evidence, we are of opinion that the accused was entitled to have the instruction in question given, submitting the case to the jury upon the law applicable to the theory of the defense that, as shown by the evidence, another person aforesaid committed the offense of bringing the liquor into this State. The instruction correctly propounded the law in such case, to the effect that if upon the whole evidence in the case there remained a reasonable doubt as to which of the two, the accused or another person aforesaid, committed the offense, the accused could not be convicted.

It does not seem to be contended on the part of the Commonwealth that this conclusion is not correct, but the position is taken that, as the other person in question was absent from the State and not jointly indicted with the accused, the instruction as drawn and offered had no appli-

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cation to the instant case, there being no possibility of the conviction of such other person in the trial then being had. We cannot think, however, that these considerations affect the fitness of the instruction as asked. It seems to us that the concluding portion of the instruction as drawn and asked was especially pertinent to the facts of the instant case; was unmistakable in its meaning; and was the same in effect as if it had concluded, "the accused cannot be convicted," in lieu of the language, "neither of the two can be convicted."

The refusal to give this instruction appears from the evidence to have been prejudicial to the accused, and hence was reversible error. If, therefore, upon another trial the evidence on the subject under consideration shall be to the same effect as on the trial which has been had, instruction 5, or substantially such an instruction, should be given.

For the reasons above stated, the case must be reversed because of the refusal of the trial court to give the instruction mentioned.

Reversed.

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Richmond.

FLIPPO V. COMMONWEALTH.

January 24, 1918.

1. CRUELTY TO CHILDREN—*Evidence Insufficient to Support Verdict.*—In the instant case defendant was tried and convicted and judgment awarded against him for a fine of $50 for unlawfully overworking and cruelly treating a boy thirteen years old, who was under his control. The boy was under the care of the superintendent of the Children's Home Society of Virginia, who testified that he was incorrigible and that he had put him under the care of defendant about four years previous to defendant's conviction, and during that time he had much improved in appearance, mental development and behavior; and that the boy was much opposed to leaving defendant. The boy himself testified that accused was never cruel to him and that he did not want to leave him. The chief witness against defendant, in whose testimony another witness concurred, did not testify to any cruel act of defendant, his testimony merely consisting of what the boy had told him. These statements of the boy were repeated to defendant by this witness and he either denied them or gave satisfactory explanations of them. The evidence as to overworking the boy was very slight.

   Held: That the evidence, though considered as on a demurrer thereto by defendant, was not sufficient to sustain the verdict.

2. CONFESSIONS—*Hearsay Evidence.*—Upon the trial of defendant for cruelty to a boy under his control, a witness for the Commonwealth testified to statements made by the boy to him, which he had repeated to defendant, who had either given satisfactory explanations of them or denied them.

   Held: That such testimony was purely hearsay and did not amount to a confession by defendant.

3. CRUELTY TO CHILDREN—*Boy Placed with Farmer by Superintendent of Children's Home.*—Where a boy was placed by the superintendent of the Children's Home Society of Virginia, in whose care he was, with a farmer to bring up, if his conduct was such as to require reasonable and moderate correction for his welfare, it was the right and duty of the farmer to administer it.

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Error to a judgment of the Circuit Court of Henrico county.

Reversed.

The opinion states the case.

Geo. P. Haw, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile,* for the Commonwealth.

BURKS, J., delivered the opinion of the court.

W. F. Flippo, the plaintiff in error, was tried and convicted by a justice of the peace on a warrant charging, "that within the last twelve months, at said county, W. F. Flippo did unlawfully overwork and cruelly treat a child, Carl Bice, thirteen years old, who was under his control." The justice imposed upon him a fine of fifty dollars, and, on appeal to the circuit court, a new trial was had and he was again convicted and judgment was awarded against him for a fine of fifty dollars. To that judgment this writ of error was awarded.

The Commonwealth having waived its objection to the bill of exceptions in this case, the only assignment of error which need be considered is that the verdict was contrary to the law and the evidence.

The entire evidence in the case, as certified by the trial court, was a follows:

"Strang, a witness for the Commonwealth, testified as follows: That hearing that W. F. Flippo who was farming on the Varina farm, in Henrico county, was mistreating a boy named Carl Bice, who lived with him, he made inquiries in the neighborhood and then conferred with Sheriff

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Sydnor and they went together to Varina to investigate the matter and talked with the boy and Flippo. That the boy said he was thirteen years of age and had been living with Flippo four years. That in March of this year Flippo made him plough with a three-horse team while he, Flippo, ploughed with a two-horse team; that his team stopped and refused to go on and Flippo came to him and, using the whip with which he, Flippo, was driving, his team, he whipped the boy's team and started them *doing* and, as they went off, Flippo cut the whip behind him and cut the boy on his legs and brought blood. This statement was made in the presence of Flippo who, thereupon, admitted that it was true, but stated that he did not intend to do it. Strang also said the boy stated that Flippo struck him with his fist on his head once. Flippo admitted this, but denied that it happened on the same day he struck the boy with the whip, and claimed that he struck the boy with his hand and not with his fist. The boy stated, and Flippo admitted, that the boy was struck on the head about two weeks before being interviewed by the officers. Strang further testified that at the time he talked with Flippo and the boy, the boy had a bump on his head, and stated that it was caused by Flippo striking him with his fist; but that Flippo claimed he struck the boy only with his open hand. Strang further testified that the boy asked Sydnor and himself to take him away, but they did not, at that time, do this, but left him with Flippo, with directions not to mistreat him in any way and that the boy was not taken away until Flippo was convicted by the justice of the peace.

"W. W. Sydnor, another witness of the Commonwealth, testified that he went with Strang to Varina, and talked with Flippo and the boy and substantiated Strang in all of the above testimony.

"Jake Hayes, another witness, a colored man, testified that last April he saw the boy driving a harrow over plowed

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land, that he was barefooted and limping and he asked him what was the matter with him, and he said the bottom of his feet were sore. That he, Hayes, was about fifty yards off and could not see the condition of his feet. That in March he saw Flippo strike the boy with the whip when he was ploughing, that he was not very near him.

"J. A. Loving, another witness for the Commonwealth, testified that in March last, there was a snow that covered the ground. That Flippo was away visiting his brother who lived on the same farm about a mile distant, and that Carl was left alone at the place and had to feed all the teams and stock, consisting of four or five horses and mules and two or three cows; that the feed and teams and cattle were all under shelter.

"Jessie Johnson, a colored man, and a witness for the Commonwealth, testified: 'Was with Jack Hay and saw boy harrowing and he was limping, he did not see or examine boy's feet nor did Hay.'"

The witnesses for the accused testified as follows:

"Dr. Maybee, superintendent Children's Home Society of Virginia, testified: Carl Bice was under his care and he put him out at one place and he ran away. That about four years ago he put him with W. F. Flippo who was then living at Victoria, Virginia. That Carl was incorrigible and was not neat and did not care much for his person. That Flippo has several times reported to him Carl's misbehavior. That Carl has improved very much in his appearance and his mental developments and his behavior. That Carl was much opposed to leaving Mr. Flippo. That he, Maybee, was away from the city when this matter was before the justice; on his return he went to Flippo with ——— Strang, and the boy was so much opposed to leaving that he had to use force to take him away. That he found another home for Carl with a family near Staunton, but Carl ran away and went back to Flippo and Flippo wrote him,

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Maybee, and then Maybee allowed the boy to remain with Flippo and he is there now.

"The accused testified: The boy had been with him four years. That when he came there he was very filthy and had very bad habits and was very unmanageable and gave him a good deal of trouble. That he had done the best with him he could, had cared for him, and had been kind in his treatment. He had found it necessary at times to discipline him, but had never been cruel or unkind to him. That several times he thought of returning him to the home and wrote Dr. Maybee of his behavior. That his wife taught him sometimes and some years he sent him to the public school; that he attended school or was taught by his wife every session. That he never did strike him with his fist; that once in his chamber he shoved him with his hand and the boy tripped over something and fell against the door, striking his head, which made a slight bruise on his forehead. That at the time the boy was limping while harrowing, barefooted. he had more than one pair of shoes and left them off of his own accord. That he never struck him with an ear of corn in anger on any occasion. That in March last when the snow came he was at his brother's about a mile away and remained there only one day. That the boy did not suffer any. That the time he is said to have cut the boy had whipped the team to make them go and as they moved off from him he continued to cut and crack the whip behind the team; that he did not intend to cut the boy, though he might have cut him once if at all. That when Strang and Sydnor said he had struck him and drawn blood he said, 'If Carl says so he ought to know, but I did not know it, and did not intend it.' That he did not admit that he had done it. That the three-horse plow in the land he was plowing was not very hard to handle as the rows were long and the land in good condition and the plow needed very little attention except in turning at the ends. and then

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the horses dragged it around. That when he left the boy at Christmas he made all necessary provision for his comfort and 'phoned Mrs. Canfield to ask Mr. Canfield to look after him. That the boy has greatly improved in every respect since he has had him, and is very fond of him, Flippo, and his wife. That when Sydnor and Strang proposed to take him away, he cried and begged not to be carried away. That at the time he was lame it was from dew galls. That it is not cruel to have a boy thirteen years old to drive a harrow, run a single cultivator or run a three-horse plow, that he had done such work and even drove a four-horse wagon before he was as old as that. That Carl preferred that work to working around the house.

"Mrs. J. E. Flippo, wife of the accused, testified that her husband had always been kind to the boy. That the boy had greatly improved, since he came to them. That her husband did not strike him with his fist the time alleged nor at any time. That he had shoes at all times and not compelled to go bare-footed and was not overworked.

"E. J. Flippo, father of accused, testified that the accused is of kindly temper and disposition and never was cruel and unkind to the boy. That while they were at Victoria, saw boy daily. The boy needed restraint and disciplining. The accused is good tempered and kindly and not cruel. He and all of his sons did as hard work as this boy before they were as old as he is, and that it is not cruel to have such work done by a thirteen year old boy.

"Virgie Long, brother-in-law of accused; J. Long, father-in-law, and F. Flippo and Ellis Flippo, brothers of accused, said that Carl did and is said to have done the things he is accused of, and was not cruel. That they did similar work before they were as old as he, and that accused was not cruel to the boy, that they saw a good deal of them.

"Carl Bice, the boy who it is charged was overworked and cruelly treated, testified accused never was cruel to him.

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That when accused cut him with whip and drew blood he did not intend to cut him and it did not hurt him very much. That the time he was harrowing bare-footed he had shoes, but preferred to go bare-footed. That his feet were sore from dew galls. That accused never struck him with his fist or an ear of corn, and never punished him except when he should have done so, that accused was never cruel or unkind to him. That he left the place near Staunton and came home to Mr. Flippo and did not want to leave there. That he did not tell Strang that accused struck him with his fist and that he never struck him with an ear of corn."

The evidence, though considered as on a demurrer thereto by Flippo, is not sufficient to sustain the verdict. The treatment accorded to that incorrigible boy by Flippo cannot be said to have been cruel, nor does the evidence show that he was overworked. The chief witness against the accused was the witness Strang, in whose testimony the sheriff of Henrico county concurs. Strang does not testify to any act done by Flippo. His testimony was pure hearsay, consisting of what the boy told him, and could not be used against the accused except to the extent that it amounted to a confession. Strang repeated the statements of the boy to Flippo, and he either denied or gave a satisfactory explanation of each of them. Such statements are not confessions. *Jackson* v. *Commonwealth* (Pearl Bryan Case), 100 Ky. 239, 33 S. W. 422, 1091, 66 Am. St. Rep. 336. The explanations of Flippo are in entire harmony with his testimony at the trial, and are not contradicted by any evidence on behalf of the prosecution. The testimony of Dr. Maybee and of other witnesses for the defense does not conflict with that given for the prosecution, though, in some of its aspects, it is explanatory thereof. If this boy was overworked and cruelly treated by Flippo, it is very strange that he should have been so opposed to leaving Flippo that it was necessary "to use force to take him away," and that

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after he was placed in another home he should have run away and returned to Flippo. It is hardly less strange that Dr. Maybee, whose duty it was to see that he was provided with a proper home, should have permitted him to remain with Flippo, and that he should be now, with Dr. Maybee's consent and approval, there and "not want to leave there," while the Commonwealth is asking this court to affirm a judgment of conviction against Flippo for overworking and cruelly treating him. The boy was taken into Flippo's family and rightfully put to work. That, at times, he needed correction and received it, we do not doubt. But that he was cruelly treated or overworked is not made to appear from the evidence. Flippo was training the boy along useful lines in the station of life that he would probably have to occupy in the future, and he was improving under his treatment. If his conduct was such as to require reasonable and moderate correction for his welfare, it was the right and duty of Flippo to administer it. The evidence does not support the verdict found by the jury, and the judgment entered thereon must, therefore, be reversed.

Reversed.

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Syllabus.

Richmond.

GREEN v. COMMONWEALTH.

January 24, 1918.

1. CRIMINAL LAW—*Minors—Holding for Grand Jury.*—Section 2, chapter 350, Acts 1914, page 696, provides that: "No court or justice, unless the offense is aggravated, or the ends of justice demand otherwise, shall sentence or commit a child under eighteen years of age charged with or proven to have been guilty of any crime to a jail, work-house or police station, or send such a child on to the grand jury, nor sentence such child to the penitentiary," etc. As chapter 350 of Acts 1914 invests justices of the peace as well as courts of record with jurisdiction of cases arising under that act, the judgment of a justice of the peace in sending the accused, a minor sixteen or seventeen years of age, on to the grand jury was equivalent to the judicial ascertainment of the fact that the grave offense wherewith he was charged was aggravated, or that the ends of justice demanded its investigation by the grand jury. Therefore, while that judgment remained in force, the circuit court was under obligation to respect it, and it afforded sufficient ground for putting the accused upon trial.

2. HOMICIDE—*Indictment and Information—Description of Bullets.*—An indictment for murder alleged that the killing was done with a loaded shot-gun and that the shot-gun was loaded with gunpowder and leaden "shots or bullets." It was contended that the missiles used in loading the shot-gun with which the homicide was committed should have been described conjunctively.

   Held: That there was no force in this contention, as the statute provides, that "all allegations unnecessary to be proved may be omitted in any indictment or other accusation" (Code 1904, section 3998); and omissions from indictments "of any particular kind of force and arms; * * * or the omission or insertion of any other words of mere form or surplusage," will not vitiate an indictment. (Code 1904, section 3999.) In this indictment, the words "shots" and "bullets" were not used disjunctively or alternatively, but synonymously or interchangeably; and, hence, they introduce no element of uncertainty in the allegation even if the words were regarded as

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material. An averment that the killing was done with a loaded shot-gun would have been quite sufficient, without specifying the kind of missiles employed.

3. JURY AND JURY TRIAL—*Venire Facias—Variance.*—A writ of *venire facias* directed the officer to summon sixteen persons for the trial of "James and Wesley Green," and the return so described the defendants, while the indictment designated them as "James Green and Wesley Green." After the defendants had elected to be tried separately, a second, or supplemental, writ of *venire facias* directed the sheriff to summon two other persons for the trial of "James Green," and for these alleged variances there was a motion to quash both writs.

Held: That these writs in all essential particulars complied with the statute, and the supposed discrepancy in the description of the defendants in the indictment and writs is immaterial, and could in no way have prejudiced their rights.

4. WITNESSES—*Impeachment—Argument of Counsel.*—Rebecca Harris, the mother of accused, was introduced as a witness by the Commonwealth to prove the homicide; but her testimony on cross-examination strongly tended to sustain the theory of the accused that he shot the deceased in defense of his mother. The Commonwealth was not altogether dependent upon the testimony of this witness to prove that the homicide was committed by the accused. Nevertheless, the attorney for the Commonwealth, in arguing his right to introduce evidence to contradict certain statements made by Rebecca Harris, asserted that "the Commonwealth would not be bound by the evidence of Rebecca Harris * * * if she told a pack of lies;" and also referred to her as "a person I consider a criminal, and probably ought to have been indicted." These remarks were excepted to by the prisoner but the exception was not sustained by the court, nor was the jury admonished that they were improper, and should not influence them in arriving at their verdict.

Held: That the statements made by the prosecuting officer in the circumstances mentioned constituted reversible error.

5. WITNESSES—*Impeachment of Witness—Statements of Counsel.*—It is difficult, at best, to disabuse the mind of the jury of derogatory statements of counsel made in respect to the character of a witness, even where the court instructs them on the subject, but the ill consequences are immeasurably increased when the objectionable language goes unrebuked. Section 3351 of the Code of 1904 declares that a party introducing a witness shall not be allowed to impeach his credit by general evidence of bad character; but, if in the opinion of the court, the witness proves adverse, he may contradict him by other evidence showing that at other times he had made statements

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inconsistent with his present testimony. Yet this contradicting evidence must be introduced by leave of court and after the witness has been fully put on guard with respect to it. If, therefore, a witness so introduced cannot be impeached by general evidence of his bad character, *a fortiori* he should not be discredited before the jury by opinions of the prosecuting attorney with respect to his character.

6. CRIMINAL LAW—*Instructions—Not Based on the Evidence.*—Instructions which propound correct general propositions of criminal law, but are not applicable under the evidence adduced in the case, are calculated to confuse and mislead the jury, and ought not to be given.

7. HOMICIDE—*Instructions—Not Based on the Evidence.*—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, and the evidence, both for the Commonwealth and the accused, showed the existence of great provocation, namely, that when the fatal shot was fired the deceased was violently choking the mother of the accused, instructions that to sustain provocation as a defense to murder in the first degree, it must be shown that the prisoner, at the time of the fatal shooting, was deprived of the power of self-control by the provocation which he received, and that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie* willful, deliberate, and premeditated killing, were calculated to confuse and mislead the jury, and ought not to have been given.

8. HOMICIDE—*Instructions—Threats—True or False.*—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction: "The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned."

9. HOMICIDE—*Justifiable Homicide.*—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction, which was applicable under defendant's theory of the case: "The court instructs the jury that justifiable homicide is the killing of a human being in the necessary, or apparently necessary, defense of one's self or family from great bodily harm, apparently attempted to be committed by force, or in defense of home, property or person, against one who apparently endeavors by violence or surprise to commit a felony on either."

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Error to a judgment of the Circuit Court of Charles City county.

Reversed.

The opinion states the case.

Henley, Hall & Hall, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile,* for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

Plaintiff in error, James Green (a minor sixteen or seventeen years of age) was jointly indicted with his brother, Wesley Green, for the murder of John Harris. The prisoners elected to be tried separately. Whereupon, plaintiff in error interposed a demurrer to the indictment, which was overruled; and upon the plea of not guilty the jury convicted him of murder in the second degree and fixed the term of his imprisonment in the penitentiary at eight years. To the judgment sustaining that verdict this writ of error was granted.

1. The first, fourth and ninth assignments of error assert that the court erred in permitting the prisoner to be indicted, tried and sentenced for the felony with which he was charged, because it contravenes the provisions of chapter 350, Acts 1914, page 696 (Va. Code, Vol. 4, page 1001).

Section 2 of the act prescribes: "No court or justice, unless the offense is aggravated, or the ends of justice demand otherwise, shall sentence or commit a child under eighteen years of age charged with or proven to have been guilty of any crime to a jail, work-house or police station, or send such a child on to the grand jury, nor sentence such

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child to the penitentiary; but such child may be committed after hearing is had, as is hereinafter provided, to the State Board of Charities and Corrections or any society or association formed for the purposes specified in section 1 of this act; or the court or the judge above mentioned, may commit such a child to a reformatory under the laws now or hereinafter provided for such commitment. Nothing herein shall prevent the imposition of such punishment as is prescribed by the laws of the State of Virginia for the offense with which such child is charged, when no society or association or reformatory will accept such child."

The parties were arrested upon a warrant charging that they feloniously and of their malice did kill and murder John Harris; and they were carried before a justice of Charles City county, who endorsed on the warrant the following judgment: "The accused James Green and Wesley Green brought before us, and cases examined and sent on to the grand jury."

Chapter 350 invests justices of the peace as well as courts of record with jurisdiction of cases arising under that act; and the judgment of the justice in this instance in sending the accused on to the grand jury was equivalent to the judicial ascertainment of the fact that the grave offense wherewith he was charged was aggravated, or that the ends of justice demanded its investigation by the grand jury. Therefore, while that judgment remained in force, the circuit court was under obligation to respect it, and it afforded sufficient ground for putting the accused upon trial.

2. The second assignment of error involves the overruling of the demurrer to the indictment. The ground of demurrer is, that the missiles used in loading the shot-gun with which the homicide was committed should have been described conjunctively.

An averment that the killing was done with a loaded shot-gun would have been quite sufficient, without speci-

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fying the kind of missiles employed. The statute provides, that "all allegations unnecessary to be proved may be omitted in any indictment or other accusation" (Code, section 3998); and omissions from indictments "of any particular kind of force and arms; * * * or the omission or insertion of any other words of mere form or surplusage," will not vitiate an indictment. (Section 3999.) The allegation is that the shot-gun was loaded with gunpowder and leaden "shots or bullets." "Shot" is defined as "a projectile, particularly a solid ball or bullet that is not intended to fit the bore of a piece; also such projectiles collectively." In this indictment, the words "shots" and "bullets" are not used disjunctively or alternatively, but synonymously or interchangeably; and, hence, they introduce no element of uncertainty in the allegation even if the words were regarded as material. The principle is thus illustrated by Mr. Bishop: "It is not ill to allege that the defendant stole a mare 'of a bay or brown color,' since 'bay' and 'brown' are in this connection the same in meaning." 1 Bishop's New Cr. Proc., sec. 590. This statement of the law is well sustained by authority.

3. The third assignment of error is to the court's refusal to quash the two writs of *venire facias* and the lists accompanying the same, and the sheriff's return. The first writ directed the officer to summon sixteen persons for the trial of "James and Wesley Green," and the return so described the defendants, while the indictment designates them as "James Green and Wesley Green." After the defendants had elected to be tried separately, the second, or supplemental, writ of *venire facias* directed the sheriff to summon two other persons for the trial of "James Green;" and for these alleged variances there was a motion to quash both writs.

In *Bennett* v. *Commonwealth*, 106 Va. 834, 55 S. E. 698, it was said that section 4018 does not require the name of

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every one to be tried to appear in the writ. These writs in all essential particulars complied with the statute, and the supposed discrepancy in the description of the defendants in the indictment and writs are immaterial, and could in no way have prejudiced their rights.

4. The fourth assignment of error is to certain remarks of the prosecuting attorney in respect to Rebecca Harris, the wife of the deceased and mother of James Green, made in the presence of the jury.

Rebecca Harris was introduced as a witness by the Commonwealth to prove the homicide; but her testimony on cross-examination strongly tended to sustain the theory of the accused that he shot the deceased in defense of his mother. It may be noted that the Commonwealth was not altogether dependent upon the testimony of this witness to prove that the homicide was committed by the accused, inasmuch as the killing was admitted by the prisoner to E. H. Major, sheriff, who established that fact. Nevertheless, the attorney for the Commonwealth, in arguing his right to introduce evidence to contradict certain statements made by Rebecca Harris, asserted that "the Commonwealth would not be bound by the evidence of Rebecca Harris * * * if she told a pack of lies;" and also referred to her as "a person I consider a criminal, and probably ought to have been indicted." These remarks were excepted to by the prisoner but the exception was not sustained by the court, nor was the jury admonished that they were improper, and should not influence them in arriving at their verdict.

We think this ruling of the court might well have been construed by the jury as a tacit acquiescence in the animadversions of the prosecuting attorney. It is difficult, at best, to disabuse the mind of the jury of derogatory statements of counsel made in respect to the character of a witness, even where the court instructs them on the subject, but the ill consequences are immeasurably increased when the objec-

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tionable language goes unrebuked. Section 3351 of the Code declares that a party introducing a witness shall not be allowed to impeach his credit by general evidence of bad character; but, if in the opinion of the court, the witness proves adverse, he may contradict him by other evidence showing that at other times he had made statements inconsistent with his present testimony. Yet this contradicting evidence must be introduced by leave of court and after the witness has been fully put on guard with respect to it. If, therefore, a witness so introduced cannot be impeached by general evidence of his bad character, *a fortiori* he should not be discredited before the jury by opinions of the prosecuting attorney with respect to his character. *Gordon* v. *Funkhouser*, 100 Va. 675; 42 S. E. 677; *McCue's Case*, 103 Va. 870, 49 S. E. 623.

In *Jessie's Case*, the statement made by the prosecuting attorney that a witness, who had been the housekeeper for the accused, and who had testified before the coroner's jury, had been induced by him to leave the State, there being no evidence to support the statement, was held to be highly prejudicial to the accused, and the refusal of the trial court to instruct the jury to disregard it was reversible error. *Jessie* v. *Commonwealth*, 112 Va. 887, 71 S. E. 612.

So, in *Mullins' Case*, it was held that, "Arguments made and opinions expressed by the Commonwealth's attorney when there was no evidence in the case upon which to base either, cannot be said to be without prejudice to the accused." *Mullins* v. *Commonwealth*, 113 Va. 787, 75 S. E. 193.

We think the present case comes within the principle enunciated in the cases cited, and that the statements made by the prosecuting officer, in the circumstances mentioned, constitute reversible error.

5. The remaining assignment of error which need be noticed relates to the giving and refusal of instructions.

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Exception was taken by the accused to the giving of instructions "F" and "G" on behalf of the Commonwealth. These instructions propound correct general propositions of criminal law, but they were not applicable under the evidence adduced in this case; and, therefore, were calculated to confuse and mislead the jury, and ought not to have been given.

These instructions are as follows:

"F. The court instructs the jury that to sustain provocation as a defense to murder in the first degree, it must be shown that the prisoner, at the time of the fatal shooting, was deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the character of the provocation, and the act by which death was caused to the time which elapsed between the provocation, and the act which caused death to the prisoner's conduct during the interval, and to all circumstances tending to show the state of his mind at the time he committed the act."

"G. The jury are instructed that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie* willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances."

Instruction "F" applies to a case where the defense rests upon the ground that the accused was deprived of the power of self-control by the provocation given; and instruction "G" would be proper where the ground of defense is as stated above, and the evidence shows either that there was no provocation or very slight provocation for the act done. The evidence, both for the Commonwealth and the accused, showed the existence of great provocation, namely, that when the fatal shot was fired the deceased was violently choking the mother of the accused.

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Exception was likewise taken to the refusal of the prayer for instruction 4, which is as follows:

"The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned."

This instruction was pertinent and embodies a correct statement of the law, and ought to have been given.

The refusal to give the following instruction was also made a ground of exception: "The court instructs the jury that justifiable homicide is the killing of a human being in the necessary, or apparently necessary, defense of one's self or family from great bodily harm, apparently attempted to be committed by force, or in defense of home, property, or person, against one who apparently endeavors by violence or surprise to commit a felony on either."

This instruction was approved in *Hodges* v. *Commonwealth,* 89 Va. 265, 272, 15 S. E. 513, and is applicable under the defendant's theory of the case and should have been given.

The assignment of error for the refusal of the court to set aside the verdict as contrary to the law and the evidence need not be discussed, since the judgment must be reversed, the verdict set aside and a new trial granted upon the grounds hereinbefore indicated.

Reversed.

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Richmond.

LUCCHESI v. COMMONWEALTH.

January 24, 1918.

1. INTOXICATING LIQUORS—*Prohibition Act—Transportation—Sufficiency of Indictment.*—The first count of an indictment for violation of the prohibition act charged the accused with bringing more than one quart of ardent spirits into the State from a point without to a point within this State for use within the State; the second count charged him with unlawfully bringing into the State from a point without the State to a point within this State more than one quart of ardent spirits within a period of thirty days; and the third count with unlawfully transporting ardent spirits from one point to another within this State.

   Held: That this indictment was sufficient under section 39 of the prohibition act (Acts 1916, page 215).

2. SEARCHES AND SEIZURES—*Admissibility of Evidence Illegally Obtained—Articles Taken from Accused.*—A person legally arrested and in the custody of the law on a criminal charge may be subject to a personal search and examination, even though against his will, for evidence as to his criminality, and, if found, it may be seized without violating his constitutional rights. And if any person, even by illegal seizure, procure possession of any article, instrument, or document, the State may, notwithstanding such illegal seizure, use it, if necessary, as legitimate evidence against the person from whom it was so obtained to convict him of a crime, or upon an investigation against such person before a grand jury, it being an established rule that the court can take no notice of how such evidence was obtained, whether originating from a legal or an illegal source.

3. SEARCHES AND SEIZURES—*Admissibility of Evidence Illegally Obtained—Articles Taken from Accused—Prohibition Act—Case at Bar.*—Before the accused who was charged with violation of the prohibition law was arraigned, he petitioned the court to restore to him the suit case and the ardent spirits contained therein, which were taken from him by the policemen upon his arrest; a motion to like effect was made at the trial before the jury were sworn; and again, while the Common-

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wealth was introducing its evidence in chief, he objected to introduction of the evidence that the suit case contained such ardent spirits.

Held: That such evidence was admissible.

4. INTOXICATING LIQUORS—*Prohibition Act—Transportation—Sufficiency of Evidence.*—Accused was arrested in the city of Richmond. He had arrived upon a train from Washington, D. C., which was going south, and had in his hand a suit case. He first said that he had no whiskey, but when arrested admitted that he had whiskey in the suit case. When the officers opened the suit case it was found to contain fourteen quarts of whiskey and a quart of bitters.

Held: That the evidence was clearly sufficient, unless accused was upon an interstate journey, to convict him of the violation of the statute forbidding the transportation of more than one quart of liquor in this State in personal baggage.

5. STATUTES—*Constitutional Law—Title and Subject—Construction of Constitutional Provision.*—Although a statute refers to many things of a diverse nature, the title will be sufficient if the subordinate provisions of the statute may be fairly regarded as in furtherance of and as facilitating the accomplishment of the general object expressed in the title. The constitutional inhibition was not intended to hinder remedial legislation, nor to prevent the incorporation in a single act of the entire statutory law upon one general subject. There should be a liberal construction of the title so as to uphold the statute if practicable.

6. STATUTES—*Constitutional Law—Title and Subject—Construction of Constitutional Provision—Prohibition Act.*—All the provisions in the prohibition act against the transportation of liquor are congruous and germane to the title, and the methods devised for the accomplishment of its general purpose.

7. INTOXICATING LIQUORS—*Prohibition Act—Constitutional Law—Fourteenth Amendment.*—The prohibition act (Acts 1916, page 215), as to the transportation of liquor, does not violate the fourteenth amendment of the Constitution of the United States, in that it discriminates between corporation carriers and individuals who are carriers. The provision is not intended as a discrimination in favor of corporations who are common carriers, but as a restriction equally applicable to all desirous to transport ardent spirits. All persons without discrimination are privileged to use the corporation common carriers for the transportation of certain limited quantities of liquor, and all are equally restrained, so that no discrimination exists.

8. DOCUMENTARY EVIDENCE—*Letters as Evidence—Identification.*—

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The accused sought to introduce two letters, in order to support his claim that he had secured employment in North Carolina and was on his way to accept it at the time he was arrested.

Held: That the court properly refused to admit these letters in evidence, because they were in no way identified as genuine.

9. INTOXICATING LIQUORS—*Prohibition Act—Transporting Liquor—Interstate Commerce—Burden of Proof.*—Accused was charged with transporting or bringing into the State intoxicating liquor in violation of the prohibition act. His defense was that he was engaged in interstate commerce and transporting the liquor upon a continuous journey from Washington, D. C., to a point in North Carolina. The facts relied on by the Commonwealth were admitted, and this was his only defense, which, under these circumstances, he was called upon to sustain the burden of proving. The court, at the request of accused, instructed the jury that if they believed from the evidence that the accused intended to make, and was making, a continuous journey from a point without the State through the State to another point without the State, it could not find him guilty, but amended the instruction by adding that, "when the ardent spirits in excess of one quart were found in the possession of the accused, the burden of proving the above statements as facts was thrown upon the accused."

Held: That this addition by the court to the requested instruction did not, as claimed by the accused, relieve the Commonwealth of proving the offense charged, and was not error, although in this instruction it might be said to be surplusage.

10. CRIMINAL LAW—*Instructions—Invited Error.*—Where accused in a requested instruction introduced unnecessary matter not essential to the defense relied on and with reference to which the Commonwealth had introduced no evidence, he cannot complain that the court inadvertently allowed it to remain therein.

11. INTOXICATING LIQUORS—*Prohibition Act—Constitutional Law—Personal Use.*—The State has plenary power to prohibit the importation of ardent spirits into the State for personal use or any other purpose.

12. APPEAL AND ERROR—*Conclusiveness of Verdict.*—Upon a charge of transporting or bringing into the State liquor in violation of the prohibition act, where the defense is that the transportation was interstate commerce, the jury has the right to discredit the testimony of accused, and the issue having been fairly submitted to them, their verdict will not be disturbed upon appeal.

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Error to a judgment of the Hustings Court of the city of Richmond.

Affirmed.

The opinion states the case.

Alfred E. Cohen and *L. O. Wendenburg*, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile*, for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

The accused was convicted under the prohibition law (Acts 1916, page 215) of unlawfully transporting ardent spirits in the State of Virginia. The first count of the indictment charges him with bringing more than one quart of ardent spirits into the State from a point without to a point within this State for use within the State; the second count charges him with unlawfully bringing into the State from a point without the State to a point within this State more than one quart of ardent spirits within a period of thirty days; and the third count with unlawfully transporting ardent spirits from one point to another within this State.

Upon his arraignment, he demurred to the indictment and each count thereof, which demurrer was overruled by the court, and this is assigned as error. It is sufficient to say, as to this assignment, that under section 39 of the act above referred to, the indictment is sufficient. *Pine and Scott* v. *Commonwealth*, 121 Va. 812, 93 S. E. 653; *Commonwealth* v. *Hill*, 5 Gratt. (46 Va.) 682, 687; *Hendricks* v. *Commonwealth*, 75 Va. 934, 943; *Devine* v. *Commonwealth*, 107

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Va. 860, 60 S. E. 37, 13 Ann. Cas. 361; *State* v. *Miller*, 24 Conn. 522; *Tefft* v. *Commonwealth*, 8 Leigh (35 Va.) 721; *Taylor* v. *Commonwealth*, 20 Gratt. (61 Va.) 825; *Dull* v. *Commonwealth*, 25 Gratt. (66 Va.) 965; *Whitlock* v. *Commonwealth*, 89 Va. 337, 15 S. E. 893; *Benton* v. *Commonwealth*, 91 Va. 782, 793, 21 S. E. 495.

Before the accused was arraigned, he petitioned the court to restore to him the suit case and the ardent spirits contained therein, which were taken from him by the policemen upon his arrest; a motion to like effect was made at the trial before the jury were sworn; and again, while the Commonwealth was introducing its evidence in chief, he objected to introduction of the evidence that the suit case contained such ardent spirits.

The question raised has been frequently considered, and the overwhelming weight of authority sustains the admissibility of such evidence. In 35 Cyc. 1271-2, citing many authorities, this is said: "It is well settled that a person legally arrested and in the custody of the law on a criminal charge may be subject to a personal search and examination, even though against his will, for evidence as to his criminality, and, if found, it may be seized without violating his constitutional rights. And if any person, even by illegal seizure, procure possession of any article, instrument, or document, the State may, notwithstanding such illegal seizure, use it, if necessary, as legitimate evidence against the person from whom it was so obtained to convict him of a crime, or upon an investigation against such person before a grand jury, it being an established rule that the court can take no notice of how such evidence was obtained, whether originating from a legal or an illegal source."

In 8 R. C. L. 196, this is said: "While it is true that the search of a defendant without legal justification is a trespass and an indictable misdemeanor, there is no principle or theory upon which the State may be deprived of the right

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to employ the evidence of a criminal offense thus obtained. The law appoints the remedy for the redress of the wrong, but the exclusion of the evidence criminating the defendant is not within the scope of the remedy, or the measure of redress." Citing *Shields* v. *State,* 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17; *State* v. *Turner,* 82 Kan. 787, 109 Pac. 654, 136 Am. St. Rep. 129, and note, 32 L. R. A. (N. S.) 772; *Commonwealth* v. *Tucker,* 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056; *People* v. *Adams,* 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675, 63 L. R. A. 406; *Cohn* v. *State,* 120 Tenn. 61, 109 S. W. 1149, 15 Ann. Cas. 1201, and note, 17 L. R. A. (N. S.) 451; *State* v. *Slamon,* 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711; Note 59 L. R. A. 470; *State* v. *Edwards,* 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465; Note 87 Am. St. Rep. 714; *State* v. *Sutter,* 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399.

Counsel for the accused relies upon the case of *Weeks* v. *United States,* 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177, as authority for the contrary view. Even if it were, it would be opposed to the overwhelming weight of authority. So far, however, from sustaining the proposition contended for, the contrary doctrine is expressly recognized in this paragraph of the opinion: "What then is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused, when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bish. on Cr. Proc., sec. 211; Wharton, Cr. Pl. & Pr. (8th ed.), sec. 60; *Dillon* v. *O'Brien & Davis,* 16 Cox, C. C. 245; Ir. L. R. 20 C. L. 300; 7 Am. Cr. Rep. 66. Nor is it the case of testimony offered at a trial where the court is asked to stop and

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consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." What the court did hold in that case was, that under the fourth amendment of the United States Constitution, upon seasonable application by the accused for the return of his letters and private documents, seized in his house during his absence by a United States marshal holding no warrant for his arrest and none for the search of his premises, they should be returned to him and could not be used against him in the criminal prosecution; and the opinion concludes with this: "We, therefore, reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the fourth amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies." Citing *Boyd's Case*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 514.

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The court itself then expressly limits the application of the case to the Federal government and its agencies, and expressly disclaims any purpose to impair or disapprove the established doctrine that evidences of crime found in the possession of the prisoner, or upon his person, may be used in prosecution against him, whether obtained from him legally or illegally.

The case of *Town of Blacksburg* v. *Beam*, 104 S. C. 146, 88 S. E. 441, L. R. A. 1916-E, 714, is also relied on. It is sufficient to say as to this case, that the evidence there was obtained from the defendant's private room by search made in his absence before the warrant for his arrest had been issued and without a search warrant, and therefore differs from the case at bar in which the suit case found in the possession of the prisoner was not opened until after the warrant charging him with the crime had been issued and the accused arrested.

The facts of this case are, that the accused was arrested at 2:05 A. M. on February 1, 1917, by two police officers of the city of Richmond, at Elba station. He had arrived upon an Atlantic Coast Line train from Washington, D. C., which was going south, and had in his hand a suit case. One of the policemen accused him of having whiskey therein. The accused replied that the suit case did not belong to him, and told the officers that he came from Washington and was on his way to North Carolina. Later he told the officers that he was going to his room at Twenty-fourth and Main streets, Richmond, to get his clothes, and would take an early morning train for the South. He also explained his stopping at Richmond by saying that he found out that that train would not take him to Townsville, N. C., where he desired to go, and that he would have to take a 6:35 A. M. Seaboard Air Line train from Richmond in order to get to that place, and gave this as one of the reasons why he left the train in Richmond. After having first said that

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he had no whiskey, he was then arrested and admitted that he had whiskey in the suit case. After the warrant charging him with transporting whiskey illegally had been issued, his suit case was opened by the officers and found to contain fourteen quarts of whiskey and one quart of Italian bitters. It appeared that the accused had lived in Richmond a good many years, but he claimed that he had obtained work with a friend of his, giving his name, who was in the confectionary business at Townsville, N. C.

The evidence, then, is clearly sufficient, unless he was upon an interstate journey transporting the whiskey from Washington, D. C., to Townsville, N. C., to convict him of the violation of the statute forbidding the transportation of more than one quart of liquor in this State in personal baggage. Section 39, prohibition act.

Another contention is that the act is unconstitutional, in that the offense is not embraced within the title, which reads: "An act to define ardent spirits and to prohibit the manufacture, use, sale, offering for sale, transportation for sale, keeping for sale, and giving away of ardent spirits as herein defined, except as provided herein; to prohibit advertisement of such ardent spirits; to prescribe the jurisdiction for trial and appeals of cases arising under this act; to prescribe the force and effect of certain evidence and prosecutions for violation of this act; to create the office of commissioner of prohibition and to define his duties and powers and compensation; defining intoxication and who is a person of intemperate habits within the meaning of this act; prescribing certain rules of evidence in certain prosecutions under this act; exempting certain counties and cities from certain provisions of this act and authorizing additional restrictions and limitations beyond the provisions of this act as to sale, manufacture or delivery of ardent spirits in certain counties and cities; to provide for the enforcement of this act and to prescribe penalties for

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the violation of this act; to appropriate out of the treasury of the State necessary moneys for the enforcement of this act; and to repeal all acts or parts of acts in conflict with this act."

It is sufficient to say that this title clearly indicates the general purpose of the act to prohibit the manufacture, use, sale, transportation for sale and giving away of ardent spirits. The transportation for sale is by the act absolutely prohibited, while transportation for private use in limited quantities is expressly permitted. It is perfectly well settled in this State that although a statute refers to many things of a diverse nature, the title will be sufficient if the subordinate provisions of the statute may be fairly regarded as in furtherance of and as facilitating the accomplishment of the general object expressed in the title. The constitutional inhibition was not intended to hinder remedial legislation, nor to prevent the incorporation in a single act of the entire statutory law upon one general subject, as this act does. There should be a liberal construction of the title so as to uphold the statute if practicable. All of its provisions against the transportation of liquor are congruous and germane to the title, and the methods devised for the accomplishment of its general purpose. So this court has decided in refusing to grant a writ of error in the case of *W. H. Wiley* v. *Commonwealth*, from the Corporation Court of the city of Lynchburg, and in *Burton* v. *Commonwealth*, *ante* 847, 94 S. E. 923, this day decided. *Wilburn* v. *Raines*, 111 Va. 339, 68 S. E. 993; *Commonwealth* v. *Willcox*, 111 Va. 849, 69 S. E. 1027; *Dist. Road Board* v. *Spillman*, 117 Va. 201, 84 S. E. 103; *Commonwealth* v. *Chesapeake & Ohio R. Co.*, 118 Va. 267, 87 S. E. 622.

The suggestion that the act violates the fourteenth amendment of the Constitution of the United States, in so far as it discriminates between corporation carriers and individuals who are carriers is not supported by any authority,

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and it seems sufficient to say as to this that the provision is not intended as a discrimination in favor of corporations who are common carriers, but as a restriction equally applicable to all desirous to transport ardent spirits. All persons without discrimination are privileged to use the corporation common carriers for the transportation of certain limited quantities of liquor, and all are equally restrained, so that no discrimination exists.

The accused sought to introduce two letters, written in Henderson, N. C., from one Abert Macchi, in order to support his claim that he had secured employment in North Carolina and was on his way to accept it at the time he was arrested. The court properly refused to admit these letters in evidence, because they were in no way identified as genuine.

This brings us to the instructions.

An instruction was offered by the accused in these words: "The court instructs the jury that if they believe from the evidence that the accused transported ardent spirits from a point without this State to the city of Richmond, in his personal baggage; that the accused intended to make, and at the time of his arrest was making a continuous journey from a point without this State through this State to another point without this State; that the ardent spirits so transported or carried by him were not intended for use within this State, and not in fact sold or offered for sale, dispensed, given away or used in any manner prohibited by law in the city of Richmond, then the jury should find the accused not guilty." This instruction was amended by the court by adding immediately after the words "city of Richmond," in the latter part of the instruction, the words, "or intended so to be," and after the words "not guilty," this language: "but when the ardent spirits in excess of one quart are found in the possession of the accused, the burden of proving the above statements as facts is thrown upon the accused."

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It is admitted that under the circumstances of this case the accused was called upon to sustain the burden of proving his affirmative defense, that he was engaged in interstate commerce and transporting the liquor upon a continuous journey from Washington, D. C., to a point in North Carolina. The facts relied on by the Commonwealth were admitted, and this was his only defense. It will be noted, however, that in the instruction which he offered he included the other matters which are now complained of—that is to say, the instruction offered by him referred to matters not relied on nor proved by the Commonwealth, such as whether or not the ardent spirits were intended for use in this State, and that they were not sold or offered for sale, dispensed, or given away in any manner prohibited by law in the city of Richmond. These matters were not essential to the defense he relied on, nor had the Commonwealth introduced any evidence with reference thereto. Having introduced this unnecessary matter in his own instruction, he cannot now complain that the court inadvertently allowed it to remain therein. The jury were properly instructed that as to his defense the burden was upon him, and the language added by the court in no improper way weakens the instruction offered by him. The question is argued as though the court had told the jury that the possession of more than one quart of ardent spirits was *prima facie* evidence of guilt. This is true under another section of the statute referring to the possession of more than one quart of liquor in the home upon prosecutions for illegal sales of liquor. This, however, was not the section in view when the addendum was made by the court. This addendum refers to section 39 of the statute under which he was prosecuted, which forbids a traveler from carrying in excess of one quart of liquor in his personal baggage, for the *bona fide* use of himself or his family, and was intended to call the attention of

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the jury to the fact that the possession of more than one quart in the personal baggage of a traveler (unless transported through the State in interstate commerce) was a violation of the law. This too may be said to be surplusage in this instruction. At the same time, it does not improperly weaken the force of the previous part of his instruction, which was intended by him to emphasize his defense to the jury that he was protected by the commerce clause of the United States Constitution. That the burden was upon him as to this affirmative defense, as above stated, is perfectly clear, and the instruction as finally given does not put any greater burden upon him. It did not, as claimed by the accused, relieve the Commonwealth of proving the offense charged, and instructions Nos. 2 and 3, given by the court at the same time, clearly and distinctly told the jury that he must be proven guilty beyond every reasonable doubt, and in express terms that they "cannot find the accused guilty in this case, if, after a fair consideration of all of the evidence, both for the Commonwealth and for the defense, they have a reasonable doubt, based upon such evidence, of the guilt of the accused of the offense charged in the indictment, or in either count thereof, or of any element necessary to constitute the offense."

The accused asked the court to instruct the jury that if they believed that the ardent spirits were brought into the State by the accused for his own personal use, and not for manufacture or sale, they should find the prisoner not guilty. This instruction is based upon the assertion that the State lacks power to prohibit the transportation of ardent spirits into this State for personal use and not for manufacture or sale, and the question is argued with great force and vigor. It is sufficient to say as to this, that recent cases decided by the Supreme Court of the United States make it clear and fully determine that the State has plenary power to prohibit the importation of ardent

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spirits into the State for any purpose. *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; *Crane* v. *Campbell*, 245 U. S. 304, 38 Sup. Ct. 98; Adv. Sheets, No. 3, Jany. 1, 1918, p. 95. The question may be regarded as definitely settled by these cases.

It is manifest that while the defense of the accused, if sustained by proper proof and credited by the jury, was a perfect defense (for the transportation occurred before the recent prohibition by Congress of the interstate transportation of ardent spirits into States which prohibit its manufacture), still the jury had the right to discredit his testimony, and the issue having been fairly submitted to them, their verdict, under the statute, comes to us as upon a demurrer to the evidence, and the judgment must, therefore, be affirmed.

Affirmed.

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Syllabus.

Richmond.

TAYLOR v. COMMONWEALTH.

January 10, 1918.

1. CHANGE OF VENUE—*Jury from Another County—Impartial Jury Secured.*—The trial court must be allowed a wide discretion in deciding motions for change of venue or for a jury from another county; and, moreover, where the motion is based on the ground that an impartial jury cannot be obtained in the county, the fact that an impartial jury has subsequently been secured therein is conclusive proof that the motion was without foundation.
2. APPEAL AND ERROR—*Evidence—Exceptions and Objections.*—Although evidence might, upon objection, have been properly excluded as hearsay evidence, where no objection was offered to its introduction, it must, on appeal, be regarded as a part of the evidence before the jury.
3. DYING DECLARATIONS—*Inadmissible Except in Cases of Homicide.*—Upon the trial of a husband for an assault on his wife, the dying declarations of his wife are inadmissible against him, where it appeared that her death was not the result of the assault upon her, but was caused by her taking poison with suicidal intent.
4. EVIDENCE—*Admission of Improper Evidence—Effect of the Court Striking Out Evidence and Instructing the Jury to Disregard it—Appeal and Error—Harmless Error.*—Where improper evidence has been admitted, in either a civil or a criminal case, the error is rendered harmless by the subsequent action of the trial court in striking out the evidence and specifically instructing the jury to disregard it, unless from the circumstances of the particular case there be reason to apprehend that such improper evidence has prejudiced the minds of the jury, in which latter event the error is reversible.
5. EVIDENCE—*Admission of Improper Evidence—Effect of the Court Striking Out Evidence and Instructing the Jury to Disregard it.*—In the instant case, where the dying declarations of a wife were admitted in evidence against her husband, upon his trial for assault on the wife, although her death was caused by her taking poison, a review of the evidence satisfied the Supreme Court of Appeals that the jury obeyed the instruc-

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tions of the trial court to disregard the dying declaration. It is not necessary to believe that the jury entirely effaced from their minds the fact that improper evidence had been introduced, and in the instant case there was abundant evidence upon which the verdict might have been found, if the declaration had not been introduced.

6. RES GESTAE—*Assault and Battery.*—A witness testified that when he arrived at defendant's house, defendant's small boy ran out of the house crying, turned immediately and ran back inside and exclaimed, "Don't Father! Don't Father!" and came right out again, saying "Father is beating mother."

Held: That this testimony as to the spontaneous and simultaneous outcry of the little boy was clearly admissible as part of the *res gestae.*

7. EVIDENCE—*Admission of Improper Evidence—Effect of the Court Striking Out Evidence and Instructing the Jury to Disregard it.*—The jury are presumed to follow the direction of the court to disregard wrongly admitted evidence, at whatever stage of the case that direction may be given.

Error to a judgment of the Circuit Court of Fairfax county.

Affirmed.

The opinion states the case.

Frederick R. Whippler, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile,* for the Commonwealth.

KELLY, J., delivered the opinion of the court.

James L. Taylor was indicted in Fairfax county for a felonious assault upon his wife, the charge being that he "did make an assault, and unlafwully, maliciously and feloniously did cause to said Blanch C. Taylor great bodily injury by beating, striking and bruising the said Blanch C. Taylor with his fists and by kneeling upon her body with

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his knees, and throwing down the body of her the said Blanch C. Taylor with great force and violence, whereby her body, head and face was greatly injured, with intent to maim, disfigure, disable and kill her the said Blanch C. Taylor, against the peace and dignity of the Commonwealth."

The trial resulted in a verdict of guilty, fixing the punishment of the accused at two years in the penitentiary, upon which the court sentenced him accordingly.

The accused made preliminary motions for (1) a jury from another county, (2) a jury from a remote part of Fairfax county, (3) a change of venue, all of which were overruled, and the accused excepted. The alleged grounds for the motions were, that the charge against the accused had been widely discussed in the county, that threats of violence had been made against him, and that he would not be able to obtain a fair and impartial trial unless some one of the motions should be granted. With these motions were filed the *ex parte* affidavits of six residents of Fairfax county and one resident of Alexandria county, all of which, while rather brief and general in their statement of facts, may be said to have tended strongly to prove the existence of such a state of local prejudice as would have prevented the accused from obtaining a fair and impartial trial. On the other hand, however, the clerk, the sheriff and the deputy sheriff of the county, who were examined as witnesses, testified *ore tenus* to the contrary, the clerk stating, among other things, that "hundreds of jurors could be obtained (in that county) who had never heard of the case." That these witnesses were correct, and that the court properly weighed their testimony, satisfactorily appears from the sequel. From the first *venire facias* of sixteen, six jurors were found free from exception, and thereupon the court ordered "that an additional writ of *venire facias* be now issued by the clerk

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directed to the sheriff commanding him to summon from the by-standers ten (10) persons of this county in addition to those heretofore summoned, residing remote from the place where the felony of which the prisoner stands accused is charged to have been committed and who do not live within three miles of said place and qualified in other respects," etc. This order was complied with, and every one of the ten men thus summoned, being examined upon their *voir dire,* were found to be competent and qualified jurors. There was not an exception taken to either of the sixteen jurors composing the panel from which the twelve who tried the case were selected.

This court has repeatedly held, and it is the established rule in Virginia, that the trial court must be allowed a wide discretion in deciding motions for change of venue or for a jury from another county; and, moreover, that where the motion is based on the ground that an impartial jury cannot be obtained in the county, the fact that an impartial jury has subsequently been secured therein is conclusive proof that the motion was without foundation. *Wormeley's Case,* 10 Gratt. (51 Va.) 658, 672-3; *Chahoon's Case,* 21 Gratt. (62 Va.) 822; *Bowles' Case,* 103 Va. 816, 48 S. E. 527; *Richards' Case,* 107 Va. 881, 59 S. E. 1104; *Looney's Case,* 113 Va. 924, 78 S. E. 625.

Before taking up the next assignment to be discussed, it will be quite necessary to state somewhat fully the material facts relating to the assault, as disclosed by the evidence for the Commonwealth. The efficacy of the most material assignment in the case depends upon these facts.

There was some conflict in the evidence, but this was due mainly, if not indeed solely, to denials by the defendant himself, who was the only witness introduced in his behalf and whose character for truth and veracity was successfully and overwhelmingly impeached. Viewing the evidence from the standpoint of the Commonwealth, as we

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must do upon an appellate review of the case, the following facts appear: About six o'clock in the evening of March 18, 1916, while the accused and his wife and their two small children (a boy aged nine and a girl aged six were alone in an upstairs room of their home, the accused struck and beat his wife in a manner which left her prostrate and in a seriously bruised and pitiable condition. While this beating was going on, a colored man named Kenner arrived at the house to deliver some family groceries. As this man approached, the little boy ran out of the house crying, turned immediately and ran back inside and exclaimed, "Don't Father! Don't Father!" coming right out again, saying "Father is beating mother." Kenner did not enter the house and did not see the attack, but "heard a scuffling noise" in the house just before the boy came out the second time. The children then ran to the near-by homes of two of Mrs. Taylor's brothers, and the latter shortly afterwards arrived at the Taylor residence. They found the accused downstairs, perceptibly under the influence of whiskey, and Mrs. Taylor upstairs on the bed, vomiting and suffering greatly from bodily injuries. Whether the vomiting was the result of these injuries or of poison which she had taken with suicidal intent just after the attack upon her, or from an antidote for the poison, does not appear and is left to conjecture, but her injuries were grievous and painful, and such as would naturally flow from a violent assault of the kind described in the indictment. Her brother testified, without objection, as follows: "Q. What did you see on your arrival? A. I found my sister lying on the bed vomiting. Q. What else did you see? A. I saw that she had been beaten, for one thing. Q. Where was it that she had been beaten? A. She had big bruises on her arm and one on the side of her head." Subsequent closer examination by her sister and others showed that she was "covered with bruises," no-

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tably severe on her stomach, back and arms. The witness Caslow, a near neighbor of the Taylors, testified, without objection, as follows: "Q. Did you go to the Taylor house that evening? A. Yes, sir. Q. Do you recall what time you got there? A. I should say about 6:30. Q. What did you do when you got there? A. I went in the dining room and mother went upstairs, and when I got in the dining room Lewis Taylor and Jim Heath were coming down stairs and were going out in the yard to fight, and when Taylor got down in the dining room he did not go out, and Mr. Heath stood there for a couple of minutes and invited him out in the yard. Taylor did not say anything, so Heath went out and went on up home, and I sat in there and talked with Mr. Taylor, and Mr. Taylor said to me, 'There is going to be hell over this thing; her brothers have taken it up.' But he said to me, 'I am fixed for it,' and he took a double-barreled shot-gun and shoved two shells in it and set it back up in the corner. Then he sat down in the chair, and the two children came and got on his lap and the little girl says, 'Papa what did you want to hit mamma like that for?' and he says, 'She pulled my hair,' and she says, 'Yes, and you beat her too,' and he says, 'Yes, I did, I slapped her face good for her.' Q. Was there anything said about clothes? A. Yes, the little girl says, 'You tore mamma's clothes off.' He says, 'No I did not,' and the little girl said, 'Yes you did, I saw you.'" The undertaker, who prepared Mrs. Taylor's body for burial some days later, testified that he found a bruise or black spot on her stomach about four inches in diameter, and a black bruise on her arm which indicated that her arm had been nearly broken.

Before passing from this narrative of the evidence as to the assault and its consequences, it is pertinent to remark that no question is made, and none could be successfully made, as to the statements of the little girl while on

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her father's lap. In so far as they were denied by him, being probably not a part of the *res gestae*, they might, upon objection, have been properly excluded as hearsay evidence, but no objection was offered to their introduction, and they must now be regarded as a part of the evidence before the jury. *Newberry* v. *Watts*, 116 Va. 730, 736, 82 S. E. 703, and cases cited.

It is also proper to add to this statement, for a reason which will hereafter appear, that after the accused had stated, as a witness in his own behalf, that he and his wife had lived happily together, the Commonwealth introduced evidence of a previous assault which he had made upon her, accompanied by a grossly abusive and profane imprecation which we will not here repeat.

The assault for which the accused was on trial occurred Saturday night. Mrs. Taylor was taken to a hospital in Washington city on Monday and died there some ten days later from the effects of the poison. The fact that she took poison at the time of her husband's attack upon her, and that her death followed in consequence, was before the jury without objection.

During the progress of the trial the Commonwealth offered in evidence, as a dying declaration, an *ante-mortem* statement of Mrs. Taylor, alleged to have been made to and written down by the witness, McIntosh. The accused objected on the ground "that dying declarations were inadmissible, except in homicide cases in fear of death impending as a result of the act of the accused." The court overruled the objection, and the following statement was then read to the jury:

"I, Blanch C. Taylor, knowing I am going to die do make this my dying statement. He had been home all day and I stayed up stairs to keep out of his way and then he come up stairs and knocked me down on the bed and jumped on me with his knees he hit me side of the head

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with his fist and knocked my head against the window the children houst the window and called for there uncle Jim and ed he hen loaded his gun and said if either of those brothers of yours come in there he would kill them and he told me after I takend the poison to lay there and suffer that he would do me he come into the hospitle Sunday 26th and ask me did I make a statement to a certain man and I told him to go away that I could not talk and he said if you did to make up your mind that we would both go together please try to keep him out of here and I am afraid he will kill me if he hears of this I know he will.

"Me and my children has had a hard time living with him he has beat me a dozen times before this and the knight I takend the poison he laid over behind me in the same bed and slept all knight whild the others tried to save me."

The foregoing statement was read to the jury in the forenoon. Some hours later, and after the noon recess had intervened, the court, on its own motion, addressed the jury as follows:

"Gentlemen of the jury, it is developed by the evidence in this case that it is not claimed that the licks which it is alleged that this man gave his wife, caused her death, but it seems that the contention is that her death was caused by the taking of bichloride of mercury. Therefore, gentlemen, my opinion is, that under the law the dying declaration, which I admitted here this morning, ought not to have been admitted. The dying declaration was a memorandum that Mr. Luther McIntosh read from his note book, being a statement made to Mr. McIntosh by the wife of the defendant. I want to exclude that—you all must not consider that at all. You must efface it from your minds as if it had not been testified to." The court then asked the jurors if they could disregard the dying declaration and not allow it to in any way prejudice the

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prisoner, and they "severally answered that they would not in any way consider the same."

It is conceded that it was error to admit the evidence under consideration. Dying declarations are inadmissible except in cases of homicide. 1 Greenleaf Ev., sec. 156; 10 Am. & Eng. Enc. (2d ed.), p. 370.

The question for our consideration, therefore, is: Was the error cured by the subsequent action of the court in striking out the evidence, directing the jury to disregard it, and obtaining the assurance of the jurors that they would not consider it for any purpose?

The authorities are not entirely in harmony upon the subject, but we think it may be said that the rule supported by the better reason and by the great weight of authority is, that where improper evidence has been admitted, in either a civil or a criminal case, the error is rendered harmless by the subsequent action of the trial court in striking out the evidence and specifically instructing the jury to disregard it, unless from the circumstances of the particular case there be reason to apprehend that such improper evidence has prejudiced the minds of the jury, in which latter event the error is reversible. 3 Ency. Pl. & Pr., 520; 2 R. C. L., sec. 206, 252; *N. & W. Ry. Co.* v. *Steele*, 117 Va. 788, 798, 86 S. E. 124; *Smith* v. *Whitman*, 6 Allen (Mass.) 562, 564; *Commonwealth* v. *Ham*, 150 Mass. 122, 124, 22 N. E. 704; *Austin* v. *Carswell*, 67 Hun. 579, 580, 22 N. Y. Supp. 478; *State* v. *Collins*, 93 N. C. 564, 565; *State* v. *Eller*, 104 N. C. 853, 856, 10 S. E. 313; *DuRant* v. *DuRant*, 36 S. C. 49, 55, 14 S. E. 929; *Houston Hisc. Co.* v. *Dial*, 135 Ala. 168, 185, 33 So. 268; *Orr & Hunter* v. *Garzabold*, 85 Ga. 373, 377, 11 S. E. 778; *State* v. *Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 765, 9 Ann. Cas. 648; *Throckmorton* v. *Holt*, 180 U. S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663.

The rule is stated, somewhat more liberally than we

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have stated it above, in the 3rd Vol. Ency. Pl. & Pr., p. 560, as follows: "The erroneous admission of evidence may be cured by its subsequent withdrawal by the party offering it, or by an order of the court striking it out, coupled with other instructions by the court to the jury withdrawing it from their consideration, unless it is clear that they were nevertheless unduly influenced thereby, when the judgment will be reversed." A vast array of authorities are cited in support of this text.

We shall not undertake any review of the countless authorities to be found on this subject, but shall content ourselves with an approval of the general rule as we have stated it and the following quotation from the case of *Smith* v. *Whitman*, 6 Allen (Mass.) 562, 564: "The judge having instructed the jury not to regard the testimony which he deemed wrongly admitted by him, nor to give it any consideration, we are of opinion that, even if that testimony was wrongly admitted (which is denied by the plaintiff's counsel), the claimant has no legal ground of exception. *Batchelder* v. *Batchelder*, 2 Allen (Mass.) 106; *Howes* v. *Gustin*, 2 Allen (Mass.) 406. In these two cases, the judge, immediately after admitting incompetent evidence, directed the jury that they must disregard it. In the cases at bar, the judge did not so direct the jury until there had been an adjournment of the court after the admission of the evidence. And the counsel for the claimant has argued that such direction to a jury removes the ground of exception to the admission of improper evidence only when given so soon as to prevent that evidence from making an impression on the jurors' minds. But such distinction is not supported by authority, nor is it of possible practical application. The jury are presumed to follow the direction of the court to disregard wrongly admitted evidence, at whatever stage of the case that direction may be given. See *Selkirk* v. *Cobb*, 13 Gray (Mass.)

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313; *Whitney* v. *Bayley*, 4 Allen (Mass.) 173; *Commonwealth* v. *Shepherd*, 6 Bin. (Pa.) 283, 6 Am. Dec. 449. Cases of this kind differ from those in which new trials have been granted for the reason that irrelevant and immaterial evidence, which the court did not direct the jury to disregard, may have improperly affected their verdict."

We may add that a consideration of the decisions of the courts upon this question will disclose the fact that the courts of a few of the States make a distinction between civil and criminal cases, requiring much more strictness in the application of the rule in criminal cases. This distinction, however, is not, as we believe, generally recognized, and is without substantial foundation. The rule must be the same in both classes of cases, but its application, of course, necessarily depends upon the facts of each particular case, the question to be determined in every case being, whether there is reason to apprehend that the improper evidence has prejudiced the minds of the jury.

We are entirely satisfied, in the instant case, that the error was rendered harmless by the action of the trial court. It will be observed that the court did not rest content with excluding the evidence and specifically directing the jury to disregard it, but obtained from each of the jurors the assurance that he would not give it any consideration. A careful review of the evidence which was properly before the jury satisfies us that there is no reason to apprehend that they failed to obey the instructions of the court. It is not necessary to believe that the jury did in this case, or could in any case, entirely efface from their minds the fact that improper evidence had been introduced, but the authorities, almost without dissent, recognize the ability of the jurors, as a practical matter, to find fair and impartial verdicts in cases where they have been permitted to hear improper evidence, which has been afterwards excluded from their consideration.

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That the jury, in the instant case, did not allow the so-called dying declaration to become a factor in the rendition of their verdict seems to us entirely clear; indeed, it is not too much to say that if the verdict was affected at all by the incident, the effort of the jury to keep their promise to the court and disregard the declaration, probably resulted in a more moderate punishment than they would otherwise have fixed. At any rate, there was abundant evidence upon which the verdict might, most properly, have been found, if the declaration had not been introduced. It is quite true that the alleged dying statement of Mrs. Taylor was pathetic and appealing in the extreme, but no more so than other evidence which was heard by the jury, either without objection, or without legal ground for objection.

The testimony of Kenner as to the spontaneous and simultaneous outcry of the little boy (clearly admissible as part of the *res gestae*), the statements of the little girl (introduced without objection), and the admissions of the accused himself while on the witness stand, fully establish the fact of the assault, while its malicious and felonious character satisfactorily appears from the nature of the injuries inflicted. The only particular in which it can be seriously contended that the *ante mortem* statement added anything to the sum of the Commonwealth's evidence was the specific statement therein that he "jumped on me with his knees," and this was merely corroborative of what the jury might well have believed from other evidence in the case, and was certainly no more likely than some of the other evidence to arouse the just and natural indignation of the jury. The expressions, "Me and my children has had a hard time living with him," "He has beat me a dozen times before this," etc., can hardly be considered prejudicial in view of the proof of what he did at the time of the assault for which he was being

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tried, and in view of the rebuttal testimony of Mrs. Taylor's brother, already adverted to, from which it appears that Taylor had beaten and cursed his wife upon at least one previous occasion. The fact that she had taken poison with suicidal intent and died as a result thereof, which was developed in connection with the introduction of the *ante mortem* statement, otherwise fully appears in the record, and cannot, therefore, be urged as any reason why the declaration or the evidence in regard thereto operated to the prejudice of the accused.

Upon the facts of this particular case, to which, of course, our decision is limited, we have no difficulty in holding that the error in admitting the evidence in question was cured. The verdict itself, when viewed in the light of the proper testimony in the case, seems to us entirely satisfactory evidence upon which to base this conclusion.

There were sixteen assignments of error in the petition upon which the writ of error in this case was granted; two of them were virtually waived in the argument before this court, and the others, with the exception of those which have been disposed of in the course of this opinion, are plainly without merit, involve no novel questions, and neither call for nor warrant any further discussion.

The judgment is affirmed.

Affirmed.

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Richmond.

WEBB v. COMMONWEALTH.

January 24, 1918.

1. INDICTMENT AND INFORMATION—*Conclusion—Against the Peace and Dignity of the Commonwealth of Virginia.*—Constitution of 1902, section 106, provides that: "Indictments shall conclude 'against the peace and dignity of the Commonwealth.'" An indictment which concludes "against the peace and dignity of the Commonwealth of Virginia" does not violate this provision. The added words "of Virginia" were plainly surplusage.
2. INSTRUCTIONS—*Read as a Whole.*—Instructions must be read as a whole.
3. INSTRUCTIONS—*Intent—Instructions Must be Read as a Whole—Larceny.*—Accused was charged with the larceny of a horse. Upon the question of the intent of the accused in taking the horse the trial court, at the request of the Commonwealth, instructed the jury "that in criminal cases a man on trial is presumed to have intended that which is the necessary consequence of his act, and that the jury are the judges of the evidence and can draw such deductions from the entire evidence as in their judgment should be drawn therefrom and act on same in finding their verdict." The court also instructed, at the request of the accused, "that the burden of proof is on the Commonwealth to prove beyond all reasonable doubt each and every allegation of the indictment, and if the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offense, they are bound to give the accused the benefit of that doubt," and, "that the intent of the accused at the time of the taking of the horse in the indictment mentioned is a material fact in this case, and that before they can convict him of the offense charged they must be convinced beyond all reasonable doubt that at the time he took it, he took it intending wholly to deprive the owner of this horse and without an intention to return it." In substance, the instruction given at the request of the Commonwealth has been repeatedly applied, and in the case at bar, as qualified by the other instructions, could not have misled the jury

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4. VENUE—*Evidence—Judicial Notice.*—In the instant case it was contended that the Commonwealth failed to prove that the offense was committed in Giles county, as charged. The evidence showed that the stable from which the horse was taken was at Newport, and it appeared from an act of the General Assembly of Virginia that the village known as the town of Newport, in the county of Giles, was incorporated under that name. As the Supreme Court of Appeals will take judicial notice of charters of municipal corporations, the evidence was sufficient to show that the offense was committed in Giles county.

5. LARCENY—*Intent—Proof of—Questions of Law and Fact.*—In a prosecution for larceny, it is essential for the Commonwealth to prove that the original taking was felonious; that is to say, that the taking was done with no intention to return the property taken, but to deprive the owner thereof permanently. Yet, whether or not there was such intent was a question of fact for the determination of the jury; and, if from the whole evidence, such intent might fairly be inferred, the verdict of the jury to that effect, approved by the trial court, ought not to be disturbed by an appellate court. It has been well said that there is not one case in a hundred where the felonious intent in the original taking can be proved by direct evidence. From the nature of the case, intent, generally, must be inferred from circumstances.

6. LARCENY—*Intent—Proof of.*—In the instant case, the evidence tended to show that the horse was secretly and clandestinely taken in the night time, in the absence of the owner, without any claim of right and that no act had been done by the accused down to the time of his arrest to indicate a purpose to restore it to the owner, these were circumstances conducing to the belief that the taking was felonious; and, if the jury believed that these circumstances had been established, they were sufficient to warrant their finding accused guilty, notwithstanding the defendant's protestation of his innocence.

7. APPEAL AND ERROR—*New Trial.*—Under section 3484, Code of 1904, the case of the plaintiff in error was before the Supreme Court of Appeals as upon a demurrer to the evidence, and the rule is settled by numerous decisions of that court that the verdict of a jury will not be set aside on writ of error where, when so considered, there is sufficient evidence to support it.

Error to a judgment of the Circuit Court of Giles county.

Affirmed.

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The opinion states the case.

W. B. Snidow, for the plaintiff in error.

Attorney-General Jno. Garland Pollard, Assistant Attorney-General J. D. Hank, Jr., and *Leon M. Bazile*, for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

Plaintiff in error, Philip Webb, a negro boy, was indicted for the larceny of a horse, the property of Dr. F. S. Givens, and sentenced to confinement in the penitentiary for three years conformably to the verdict of the jury.

It appears from the evidence that Webb, in company with another negro, Page, went to the stable of Dr. Givens, a physician living at Newport, Va., in the night time, and the accused, without the knowledge or consent of the owner, who was absent from home, took therefrom the horse in question. Dr. Givens, upon his return and discovery that his horse had been taken, by the use of the telephone procured the arrest of the accused while several miles from Newport and riding the horse in another direction. Page, who was arrested at the same time, was riding a horse belonging to a Mr. Logan, which he had taken from his pasture field. The boys when arrested stated that by previous arrangement they were on their way to Eggleston, a village five or six miles distant from Newport, to visit a colored girl; that they were merely taking a ride, and Page asserted that Logan had given him permission to ride his horse whenever he wanted to. Webb was the only witness introduced in his own behalf, and substantially gave the foregoing version of the occurrence. He denied that he intended to steal the horse, but declared that it was his purpose to ride it to Eggleston, and return before daylight, so

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that nobody would know anything about the affair, and he said he would have accomplished his purpose if the owner had not missed the horse and caused his arrest.

The assignments of error are:

1. To the overruling of a motion to quash the indictment, and also the demurrer thereto. The ground of this assignment is that the indictment does not conclude in the precise terms prescribed by section 106 of the Constitution of Virginia. The section reads: "Writs shall run in the name of the 'Commonwealth of Virginia' and be attested by the clerks of the several courts. Indictments shall conclude 'against the peace and dignity of the Commonwealth.'" This indictment concludes "against the peace and dignity of the Commonwealth of Virginia," and it is insisted that the addition of the words "of Virginia" violates the constitutional provision, and renders the indictment invalid. This identical question was decided adversely to the present contention by this court in *Brown* v. *Commonwealth*, 86 Va. 466, 467-8, 10 S. E. 745, 746; hence, we need hardly do more than iterate what was said by the court in that case, namely: "The mere statement of the objection to the conclusion of the indictment is a sufficient answer to it." The concluding clause contained all the words required by the Constitution, and the added words "of Virginia," was plainly surplusage, which in no way could have operated prejudicially to the accused, and does not constitute reversible error.

2. The second assignment of error is to the giving of the following instruction at the request of the Commonwealth: "The court instructs the jury that in criminal cases a man on trial is presumed to have intended that which is the necessary consequence of his act, and that the jury are the judges of the evidence and can draw such deductions from the entire evidence as in their judgment should be drawn therefrom and act on same in finding their verdict."

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Instructions must be read as a whole, and from that viewpoint the above instruction should be considered. At the request of the defendant the court gave two instructions, as follows:

(a) "The court instructs the jury that the burden of proof is on the Commonwealth to prove beyond all reasonable doubt each and every allegation of the indictment, and if the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offense, they are bound to give the accused the benefit of that doubt."

(b) "The court instructs the jury that the intent of the accused at the time of the taking of the horse in the indictment mentioned is a material fact in this case, and that before they can convict him of the offense charged they must be convinced beyond all reasonable doubt that at the time he took it, he took it intending wholly to deprive the owner of this horse and without an intention to return it."

The first instruction did not tell the jury "that the necessary consequence of finding the horse in Webb's possession was that he was guilty of the larceny of it," as counsel seemed to suppose; but, after stating that one is presumed to have intended the necessary consequences of his act, the jury were told that they were the judges of the evidence, and could draw such deductions from the entire evidence as in their judgment should be drawn therefrom and act on the same in finding their verdict. In substance, this instruction has been repeatedly applied, and certainly in this case, as qualified by the other instructions, could not have misled the jury. *Horton* v. *Commonwealth*, 99 Va. 848, 853, 38 S. E. 184; *McCue's Case*, 103 Va. 870, 910, 49 S. E. 623.

3. The last assignment is based upon the contentions that the Commonwealth failed to prove that the offense was committed in Giles county; and that the evidence was

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not sufficient to sustain the verdict. The evidence shows that Dr. Givens' house and the stable from which the horse was taken were at Newport, and it appears from an act of the General Assembly of Virginia that the village known as the town of Newport, in the county of Giles, was incorporated under that name. Acts 1871-2, p. 106. It is settled law that this court will take judicial notice of charters of municipal corporations. *Duncan* v. *City of Lynchburg*, 2 Va. Dec. 700, 706, 34 S. E. 964.

With respect to the contention that the evidence is not sufficient to sustain the verdict. It is true, and the jury were so instructed, that in order to find the accused guilty, it was essential for the Commonwealth to prove that the original taking was felonious—that is to say, that the taking was done with no intention to return the horse, but to deprive the owner thereof permanently. Yet, whether or not there was such intent was a question of fact for the determination of the jury; and, if from the whole evidence, such intent might fairly be inferred, the verdict of the jury to that effect, approved by the trial court, ought not to be disturbed by an appellate court. It has been well said that there is not one case in a hundred where the felonious intent in the original taking can be proved by direct evidence. From the nature of the case, intent, generally, must be inferred from circumstances. *Booth* v. *Commonwealth*, 4 Gratt. (45 Va.) 552.

Where, therefore, as in this case, the evidence tended to show that the horse was secretly and clandestinely taken in the night time, in the absence of the owner, without any claim of right; and that no act had been done by the accused down to the time of his arrest to indicate a purpose to restore it to the owner, these were circumstances conducing to the belief that the taking was felonious; and if the jury believed that these circumstances had been established, they were sufficient to warrant their finding, notwithstanding the defendant's protestation of his innocence.

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Plaintiff in error's case is before us as upon a demurrer to the evidence (Code, sec. 3484), and the rule is settled by numerous decisions of this court that the verdict of a jury will not be set aside on writ of error where, when so considered, there is sufficient evidence to support it.

Affirmed.

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Syllabus.

Richmond.

DERRICK v. COMMONWEALTH.

March 21, 1918.

1. LICENSES—*Civil Engineer—Engineer Employed by Railroad—Case at Bar.*—Acts 1915, page 252, chapter 148, section 89, provides that any person or firm who shall for compensation engage in the business of civil, mining, mechanical or electrical engineering shall pay a license tax of fifteen dollars per year for the privilege of conducting such business, and that any person or firm violating the provisions of this section shall be fined, etc. Under this act the accused was indicted and convicted. The accused was engaged in the practice of his profession as a civil engineer, but not in the general practice of it, in the sense that he was open to employment by the public or any part thereof. He was in the exclusive employment of another, a railroad company.

   Held: That section 89 of chapter 148, Acts 1915, does not impose a license tax upon the mere practice of one's profession as a civil engineer—the mere acting as a civil engineer—when such an one is not engaged in his own business as such engineer.

2. LICENSES—*Civil Engineer—Engineer Employed by Railroad—Case at Bar.*—The legislature might have provided that a civil engineer should pay a license tax if he practiced his profession at all, or acted at all as a civil engineer, as it did, in effect, in respect to lawyers and dentists practicing their professions; but it did not. By section 89 aforesaid, a different provision is made, and one who practices his profession as a civil engineer—one who acts as a civil engineer, *i. e.*, does that kind of work—is not merely for that reason required to pay a license tax. There is something more specified as to such action before the license tax is imposed, namely, the action must be such that it constitutes a "business of civil * * * engineering," otherwise it is not subject to any license tax.

3. LICENSES—*Civil Engineer—Engineer Employed by Railroad—Case at Bar.*—The *business* of civil engineering, which is taxed by the statute (Acts 1915, page 252, chapter 148, section 89), must be a person's *own business* in which he is engaged, in

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order to subject him to the tax. This feature of this section of the statute is not peculiar to it, however. It inheres in the meaning with which the word "business" is used in other sections of the same statute; for example, in section 45, providing that "every person, firm * * * engaged in the business of a merchant shall pay a license tax," and similar provisions in other sections as to other businesses. No one would contend that a salesman employed by a merchant having no other interest or connection with the business, was engaged in the business of a merchant, within the meaning of the statute.

4. LICENSES—*When is a Person Engaged in His Own Business.*—The mere fact that one is employed by another does not furnish a valid test of whether the former is or is not engaged in his own business. All professional men and those engaged in any kind of work for others, whether skilled or unskilled, are employed by others even when the former are engaged in their own business. When one is employed by another, the true test of whether the former is engaged in his own business, or the business of the latter, is the character of the employment. Is the former an independent contractor and as such in the employment of another and doing work for such other; or is the former a mere servant or ordinary employee of another? In the case first stated, the person employed is engaged in a business of his own, although doing work for another. In the second case, the person employed is engaged in the business of his employer, and not in a business of his own.

Error to a judgment of the Circuit Court of Lunenburg county.

Reversed.

STATEMENT OF THE CASE AND FACTS.

The accused was indicted, convicted of, and sentenced to pay a fine, by the order of court complained of for the following alleged offense under section 89 of the Acts of Assembly, 1915, p. 252, namely: that he did "for compensation engage in the business of civil engineer without having procured a license so to do * * *"

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The said statute is as follows:

"89. Civil and Electrical Engineers.—Any person or firm who shall for compensation engage in the business of civil, mining, mechanical or electrical engineering shall pay a license tax of fifteen dollars per year for the privilege of conducting such business; the said license to be procured from the commissioner of revenue of the city or district in which said engineer shall have his office on the first day of May in each year; provided, that the license of any engineer who has not practiced his profession for more than five years, or whose income from such business is less than five hundred dollars for the preceding year shall be five dollars; and, provided, further that on the payment of the license as herein provided the said engineer shall be entitled to engage in such business in any part of this State. Any person or firm violating the provisions of this section shall be fined not less than ten dollars, nor more than thirty dollars, for each offense."

THE FACTS.

The material facts are as follows: The accused was engaged in the practice of his profession as a civil engineer, but not in the general practice of it, in the sense that he was open to employment by the public or any part thereof. He was in the exclusive employment of another, a railroad company. The whole of his time and services as civil engineer were engaged and paid for by his employer and were rendered in the performance of civil engineering work for that employer, such as was necessary to be done by the latter in its business.

Theo. W. Reath, J. M. Crute and *F. S. Kirkpatrick*, for the plaintiff in error.

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Attorney-General J. D. Hank, Jr., and *Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The power of the legislature to impose a license tax upon the practice of his profession by a civil engineer—upon his acting as a civil engineer—in the business of another as well as in his own business, is not drawn in question in the instant case, and, indeed, cannot be doubted. The question before us for determination is merely whether the legislature by the provisions of the statute above quoted has exercised such power. The language of the statute itself must be looked to for the decision of such question.

It will be observed that the language of section 89 imposes a license tax on, "Any person or firm who shall * * *engage in the business* of civil * * engineering * *" The language is different from that of the sections of the same statute imposing license taxes upon lawyers, dentists and others. Section 115 of such statute provides that, "* * * no person shall act as attorney at law or practice law in the courts of this Commonwealth without a separate revenue license." Section 117 provides: "No person shall practice as a dentist * * without a revenue license * *"

We are of opinion that section 89 aforesaid does not impose a license tax upon the mere practice of one's profession as a civil engineer—the mere acting as a civil engineer—when such an one is not engaged in his own business as such engineer. The legislature might have provided that a civil engineer should pay a license tax if he practiced his profession at all, or acted at all as a civil engineer, as it did, in effect, in respect to lawyers and dentists practicing their professions, as aforesaid, but it did not. By section 89 aforesaid, a different provision is made, and one who prac-

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tices his profession as a civil engineer—one who acts as a civil engineer, *i. e.*, does that kind of work—is not merely for that reason required to pay a license tax. There is something more specified as to such action before the license tax is imposed, namely, the action must be such that it constitutes a "business of civil * * * engineering," otherwise it is not subject to any license tax. Clearly, therefore, the mere practice of one's profession as a civil engineer—the doing the work of a civil engineer—is not sufficient to bring such a person within the operation of the statute under consideration; unless the mere practice of the profession—the mere doing of the work of the profession—in all cases constitutes that work the "business" of the person doing it. Does the mere doing of the professional work always have that result? Manifestly not. It is true that oftentimes, and perhaps usually, the practice of a profession, is the "business" of the person engaged in it, but not always so. To illustrate: Said section 89 of the statute imposes a license tax on any "firm" which is engaged for compensation "in the business of civil engineering." It is evident that the statute does not impose a license tax on every member of such a firm, as, for instance, section 115 of the same statute does upon each individual member of a law firm. The language used by the legislature in the two sections is different, as above noted. One license only is exacted of a firm of civil engineers, however many members may compose it, or however many civil engineers may be employed by it, and be engaged in the practice of the profession of civil engineering, or, indeed, however many members or employees of it may be engaged "in the *business* of civil * * * engineering." And here we have disclosed a further element which distinguishes the "business" of civil engineering which is taxed by the statute (section 89), namely, it must be a person's *own business* in which he is engaged, in order to subject him to the tax. This feature of this sec-

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tion of the statute is not peculiar to it, however. It inheres in the meaning with which the word "business" is used in other sections of the same statute; for example, in section 45, providing that "every person, firm * * engaged in the business of a merchant shall pay a license tax," and similar provisions in other sections as to other businesses. No one would contend that a salesman employed by a merchant having no other interest or connection with the business, was engaged in the business of a merchant, within the meaning of the statute.

Now when is a person engaged in his own business?

The lexicographers and courts have found it impossible to define even the word "business" with sufficient accuracy to cover all cases. The same is true of the meaning of the phrase "engage in business." The learned Attorney-General has cited a number of authorities on the latter subject, namely: *Harris* v. *State*, 50 Ala. 127, 130; *Weil* v. *State*, 52 Ala. 19; *Moore* v. *State*, 16 Ala. 411; *Hewin* v. *Atlanta*, 121 Ga. 723, 730, 49 S. E. 765, 67 L. R. A. 795, 2 Ann. Cas. 296; *Easterbrook* v. *Hebrew Ladies' Orphan Society*, 85 Conn. 289, 294-5, 82 Atl. 561, 41 L. R. A. (N. S.) 615; *Gobin* v. *State*, 9 Okl. Cr. 201, 131 Pac. 546, 44 L. R. A. (N. S.) 1089; and *State* v. *Paul*, 56 Neb. 369, 76 N. W. 861. All of these cases, except the two last named, concern a business which was the person's own business who is said to be engaged in it. With the exception mentioned, these cases do not involve or consider the situation of one practicing his profession or doing other work in the business of another. It is true the cases of *Gobin* v. *State* and *State* v. *Paul, supra*, concern persons employed in the business of another; but the persons so employed were unlicensed physicians. They were employed by licensed physicians and engaged in the business of the latter. The prosecution in these cases, however, was under the Nebraska statute (Sec. 16, Art. I, Chap. 55, Compiled Statutes). This stat-

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ute, so far as material, provided that "Any person who * * * has not complied with the provisions of this act, who shall engage in the practice of medicine * * shall be deemed guilty of a misdemeanor * *," etc. That statute, like the Virginia statute with respect to lawyers and dentists, was directed against the personal action therein mentioned and not against a business. The two last named cases, therefore, and the other cases cited, as above noted, afford us no aid in ascertaining the meaning of the phrase "engage in business." They are equally far afield on the question of when a person is engaged in his own business.

We are cited to but one authority which involves the last-named question, and that is the case of *Watts* v. *Commonwealth*, 106 Va. 851, 56 S. E. 223, Ann. Cas. 1914 B, 738. While not perhaps, precisely in point, that case is very nearly so, and is very illuminating upon and, in principle, is conclusive of the question last above referred to—which indeed is the pivotal question in the instant case.

In the *Watts Case*, a construction company, duly licensed to conduct its business of general contracting, was engaged in certain construction work for a railroad company in Pittsylvania county. Watts was a day laborer in the employment of that company. He was sent by the company to Danville to employ laborers for the company. Watts did there employ a number of laborers for the company and was arrested, prosecuted and convicted of an alleged violation of the license statute (section 128, page 2247, Code 1904), which is as follows:

"Any person who hires or contracts with laborers, male or female, to be employed by persons other than himself, shall be deemed to be a labor agent; and no person shall engage in such business without having first obtained a license therefor. Every person who shall without a license conduct business as a labor agent shall pay a fine of not less than one hundred dollars nor more than five hundred dollars."

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It will be observed that this statute defines what the personal action is against which it is directed and so far as such personal action was concerned Watts came directly within the provisions of the statute. *He hired laborers to be employed by a person other than himself.* Under the very terms of the statute, therefore, he was "deemed to be a labor agent"—his action constituted him a "labor agent." But the statute did not impose a license upon such mere personal action. There was something more specified by the statute as to such action before it imposed a license tax thereon, namely, the action of the person hiring the laborers must have been such that it constituted *his business*—he must have been engaged "in such *business*"—he must have been conducting a "*business* as labor agent."

At page 852, of 106 Va., at page 224 of 56 S. E. (Ann. Cas. 1914 B, 738), this court, in its opinion delivered by Judge Whittle, said: "It thus appears that the single question presented by the record for our determination is whether or not plaintiff in error was engaged in the business of a labor agent within the meaning of the foregoing statute, it being admitted that he had no license. We have no difficulty in resolving that question in the negative. Indeed, it would seem clear that nothing more can be predicated of the transaction than that it constituted a hiring of laborers by the construction company, the principal, through the medium of its own agent, for the lawful prosecution of its business. The case is controlled by the maxim, '*Qui facit per alium, facit per se,*' (Broom's Max. 818); a failure to observe which, in such case, would impose impossible restrictions upon corporations and natural persons throughout the Commonwealth, whose businesses necessitate the employment of large numbers of laborers. Corporations must of necessity act through agents; and it is wholly impracticable for individuals engaged in large affairs personally to hire laborers to carry on their work. If the

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doctrine contended for were maintained, contractors and others of that class would be compelled either to rely on labor agents to secure necessary labor or else go out of business. It cannot be inferred that the legislature, if within its competency, intended to place such unreasonable limitations upon those essential factors in the internal improvement of the State. The purpose of the statute is to reach a class of persons, who, for compensation, conduct the business of employing laborers for other persons, with respect to whom they bear no other contractual relation; but it can have no application to a principal (whether a corporation or natural person) who, in good faith, employs such laborers for his own service by means of his own employee. In such case, under the maxim referred to, the acts of the agent are the acts of the principal.

"The differentiating features between the two transactions of hiring laborers by labor agents and by one's own agent may be illustrated by the instances of a purchase of real estate through a real estate agent, whose business it is to negotiate sales for anyone who may choose to engage his services, with whom and his patron no other contractual relation exists on the one hand, and a purchase by a principal, through his own private agent, on the other. From the former the State exacts a license, but not from the latter. In our opinion the statute in question is plainly not susceptible of the interpretation placed upon it by the trial court; but even if it were of doubtful import, being a law imposing a license tax, upon familiar principles, it would have to be construed strictly, and most strongly against the State and in favor of the citizen."

It is true that the mere fact that one is employed by another does not furnish a valid test of whether the former is or is not engaged in his own business. All professional men and those engaged in any kind of work for others, whether skilled or unskilled, are employed by others even

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when the former are engaged in their own business. When one is employed by another, the true test of whether the former is engaged in his own business, or the business of the latter, is the character of the employment. Is the former an independent contractor and as such in the employment of another and doing work for such other; or is the former a mere servant or ordinary employee of another? That is the true test. In the case first stated, the person employed is engaged in a business of his own, although doing work for another. In the second case, the person employed is engaged in the business of his employer, and not in a business of his own. The principle on which this distinction rests was involved in the *Watt's Case, supra.* It inheres in the meaning of the phrase "engage in business." The delineation of the distinction between persons who are in the class of independent contractors and those in the class of mere servants or ordinary employees, has been so often pointed out in the decisions of the courts on the subject and the discussions of it by text-writers, and is so well understood, that it is deemed unnecessary to cite authorities here elaborating such distinction. It is sufficient to say that it is manifest that the accused in the instant case was a mere servant or ordinary employee of another when engaged in the work as civil engineer for which he was indicted, and that he was not so engaged as an independent contractor. Hence, he was not then engaged in the business of civil engineer within the meaning of the statute under which he was indicted.

For the foregoing reasons, the order complained of will be reversed and the case dismissed.

Reversed.

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Richmond.

LANE v. COMMONWEALTH.

March 21, 1918.

Absent, Sims, J.

1. INTOXICATING LIQUORS—*Indictment and Information—Keeping for Sale.*—The accused was convicted of a violation of the prohibition law, Acts 1916, chapter 146, page 215. The indictment was in the form authorized by section 7 of the act, which prescribes a form that shall be sufficient for any first offense under sections 3, 4 and 5 of the act. The Commonwealth sought and obtained a conviction under section 17 of the act, which makes it unlawful to keep ardent spirits in any quantity "in a place reputed to be a house of prostitution."

   Held: That this it could not do under the blanket indictment allowed by section 7.

2. INTOXICATING LIQUORS—*"Keep."*—The word "keep," as used in section 3 of the prohibition act, means keep for sale. So, in the instant case, in order to convict under that section it was necessary for the Commonwealth to show that the keeping was for sale, but this the Commonwealth did not do nor attempt to do.

3. INTOXICATING LIQUORS—*Presumptions and Burden of Proof—Possession of Liquor.*—Under section 65 of the prohibition act, the possession of more than one gallon of distilled liquor in one's home is made *prima facie* evidence of a possession for the purpose of sale, but the evidence is only *prima facie* and may be rebutted.

4. INTOXICATING LIQUORS—*Presumptions and Burden of Proof—Possession of Liquor—Case at Bar.*—In the case at bar, according to the evidence for the Commonwealth, slightly more than one gallon of whiskey was found in the home of the defendant, but the defendant offered evidence to show that it was not all his, and that what did belong to him had been acquired by him for his personal use before November 1, 1916. If the jury believed this, they could not convict him of any offense charged in either section 3, 4 or 5, but the jury was deprived of the opportunity of considering this aspect of the case by the ruling of the trial court in the admission of evidence and

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by its instruction to the jury. The trial court, over the objection of the defendant, admitted evidence that the defendant's home was reputed to be a house of prostitution, and instructed the jury that "it is enough to convict if you believe from the evidence that the whiskey in evidence was the defendant's and that it was a house resorted to for the purpose of prostitution."

Held: That the defendant might have been prejudiced by this evidence and instruction, and for that reason the judgment of conviction was reversed and a new trial awarded.

Error to a judgment of the Corporation Court of city of Hopewell.

Reversed.

The opinion states the case.

Robert G. Hundley and *C. H. Morrisette,* for the plaintiff in error.

Attorney-General J. D. Hank, Jr., and *Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

BURKS, J., delivered the opinion of the court.

The plaintiff in error was convicted of a violation of the prohibition law, Acts 1916, chapter 146, page 215. The indictment was in the form authorized by section 7 of the act. This section declares that "while any good and sufficient indictment may be used, an indictment for any first offense under sections 3, 4 and 5 of this act shall be sufficient if substantially in the form, or to the effect" set forth in that section. The only provision in either sections 3, 4 or 5 which bear upon the case is the provision in section 3 which declares that "it shall be unlawful for any person in this State to * * * keep * * * ardent spirits, except as hereinafter provided," but it was held in *Pine and Scott* v. *Commonwealeh,* 121 Va. 812, 93 S. E.

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652, that the word "keep," as used in section 3 meant keep for sale. So that in order to convict under that section it was necessary for the Commonwealth to show that the keeping was for sale, but this the Commonwealth did not do nor attempt to do. It sought and obtained a conviction under section 17 of the act which makes it unlawful to keep ardent spirits in any quantity "in a place reputed to be a house of prostitution." This it could not do under the blanket indictment allowed by section 7. The use of that form is limited by its terms to offenses under sections 3, 4 and 5. Under section 65 of the act, the possession of more than one gallon of distilled liquor in one's home is made *prima facie* evidence of a possession for the purpose of sale, but the evidence is only *prima facie* and may be rebutted. In the case at bar, according to the evidence for the Commonwealth, slightly more than one gallon of whiskey was found in the home of the defendant, but the defendant offered evidence to show that it was not all his, and that what did belong to him had been acquired by him for his personal use before November 1, 1916. If the jury believed this, they could not convict him of any offense charged in either section 3, 4 or 5, but the jury was deprived of the opportunity of considering this aspect of the case by the ruling of the trial court in the admission of evidence and by its instruction to the jury. The trial court, over the objection of the defendant, admitted evidence that the defendant's home was reputed to be a house of prostitution, and instructed the jury that "it is enough to convict if you believe from the evidence that the whiskey in evidence was the defendant's and that it was a house resorted to for the purpose of prostitution." The court seems to have intended to convey to the jury the idea that if they believed the defendant's house was resorted to for the purpose of prostitution, they must convict if *any* whiskey was found there, however little or whenever obtained, and this

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would have been correct, if the defendant had been indicted under section 17, but he was not. The instruction cut off from the jury, or tended to do so, the consideration of the evidence of the defendant tending to show that his possession was a lawful possession. The defendant may have been prejudiced by this evidence and instruction, and for that reason the judgment of conviction must be reversed and a new trial awarded.

Sawyer v. *Commonwealth*, 88 Va. 356, 13 S. E. 708; *Doyle* v. *Commonwealth*, 100 Va. 808, 40 S. E. 925, and cases cited.

It is unnecessary to consider other assignments of error, as they are not likely to occur on another trial.

Reversed.

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Richmond.

WILKERSON v. COMMONWEALTH.

March 21, 1918.

1. INTOXICATING LIQUORS—*Indictment and Information—Constitutional Law.*—An indictment for offenses under the prohibition act (Acts 1916, page 215) was in substance as follows, that the accused, "within one year next prior to the finding of this indictment, and subsequent to the first day of November, 1916, in said city of Norfolk, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the Commonwealth of Virginia." The indictment was demurred to on the grounds that it was violative of section 8, Article 1, of the Constitution of Virginia, and section 1, Article 14, of the Constitution of the United States, because, with respect to the former, it does not sufficiently inform the defendant of the cause and nature of the accusation against her; and with regard to the latter (in addition to the first ground) that a conviction under it would deprive her of her liberty and property without due process of law.

   Held: That the indictment was not invalid for these reasons.

2. INDICTMENT AND INFORMATION—*Bill of Particulars.*—The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment.

3. APPEAL AND ERROR—*Criminal Law—Verdict Contrary to the Evidence—Evidence not Before Appellate Court.*—Where neither the evidence introduced on the trial nor the facts proved are before the Supreme Court of Appeals, either by bill of exceptions or other certification, an objection that the verdict is contrary to the evidence cannot be considered by that court.

Error to a judgment of the Corporation Court of city of Norfolk.

Affirmed.

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The opinion states the case.

Daniel Coleman, for the plaintiff in error.

Attorney-General J. D. Hank, Jr., and *Leon M. Bazile,* for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

The general form of indictment for offenses under the prohibition act (Acts 1916, page 215) is given in section 7, and in this case the indictment, in substance, is as follows: "* * * that Laura Wilkerson, within one year next prior to the finding of this indictment, and subsequent to the first day of November, 1916, in said city of Norfolk, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the Commonwealth of Virginia."

Plaintiff in error was tried upon that indictment, and a writ of error was awarded to a judgment, in accordance with the verdict of the jury, imposing upon her a fine of $50.00, and imprisonment in jail for one month.

There are two assignments of error: 1. The first assignment relates to the action of the court in overruling the demurrer to the indictment. The grounds of demurrer are, that the indictment is violative of section 8, Article 1, of the Constitution of Virginia, and section 1, Article 14, of the Constitution of the United States, because, with respect to the former, it does not sufficiently inform the defendant of the cause and nature of the accusation against her; and with regard to the latter (in addition to the first ground) that a conviction under it would deprive her of her liberty and property without due process of law.

In *Pine and Scott* v. *Commonwealth,* 121 Va. 812, 93 S.

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E. 652, in an opinion handed down by this court on September 20, 1917, the sufficiency of a similar indictment, objected to upon constitutional grounds, was drawn in question and sustained. Burks, J., after an exhaustive review of the authorities (at pages 592-3), says: "The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. Such being the function of the bill of particulars, it is readily observed that by giving an absolute right to demand it, the indictment may be greatly simplified, as is done in the present instance, and at the same time no injury or injustice be done to the accused."

2. The second assignment relates to the overruling of the petitioner's motion to set aside the verdict and grant her a new trial on the ground that it was contrary to the law and the evidence.

So much of the motion as relates to the law of the case has already been disposed of; and since neither the evidence introduced on the trial nor the facts proved are before us, either by bill of exceptions or other certification, the latter objection cannot be considered. Burks' Pl. & Pr., sec. 289-a, pp. 18-19.

Judgment affirmed.

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ABATEMENT, REVIVAL AND SURVIVAL.

Burden of Proof.—See *infra*, "Presumptions and Burden of Proof."

Dilatory Pleas Not Favored.—A plea to the jurisdiction on the ground that the defendant was a foreign corporation, did no business, and had no office or place of business, in the State, and had no agent in the State upon whom process could be legally served, is not within the reason for which the law discourages mere dilatory pleas. The defense is not merely dilatory, and does not go merely to a question of venue within the State, but is of much more serious and far-reaching character. Bank of Bristol *v.* Ashworth, 170.

Duplicity.—A plea in abatement set up as a defense that neither the cause of action, nor any part of it, arose within the jurisdiction of the trial court, and also that at the time of the service of the writ upon the defendant, defendant was within the jurisdiction solely for the purpose of defending another suit brought against him by the plaintiff. Held: That the plea was bad for duplicity. Fitzgerald *v.* So. Farm Agency, 264.

Where a plea in abatement presents two distinct and sufficient defenses, either of which, if true, would necessitate a finding on the issue in favor of the pleader, the plea is bad for duplicity. Fitzgerald *v.* So. Farm Agency, 264.

Exception for Want of Jurisdiction.—See *infra*, "Plea to the Jurisdiction."

Motion to Strike Out.—See *infra*, "Plea to the Jurisdiction."

Must Give Plaintiff a Better Writ.—It is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the State wherein the action is brought. But this requirement cannot avail where the plea shows a condition of facts under which no court in the State has jurisdiction. Bank of Bristol *v.* Ashworth, 170.

Objection to Plea Not Equivalent to Motion to Strike Out.—See *infra*, "Plea to the Jurisdiction."

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ABATEMENT, REVIVAL AND SURVIVAL—Continued.

Plea to the Jurisdiction.—*Appearance in Person or by Attorney.*—It was objected to a plea to the jurisdiction that it was not good in form because the defendant corporation appeared in person instead of by attorney. The commencement of the plea was, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the commencement of all pleas, Code, section 3269, and the signature of the plea was, "Bank of Bristol, Inc., By A. B. Whiteaker, attorney." Held: That, the objection was not well founded in point of fact. Bank of Bristol *v.* Ashworth, 170.

Bill of Exceptions.—An order of court holding that a plea to the jurisdiction was bad, is clearly a judgment upon the pleadings, and requires no exception to be stated in the order and no bill of exception to preserve the rights of the defendant thereunder, although a plea never authoritatively in the record, or being thus in is expressly stricken out, must be made the subject of a bill of exceptions, or an express order of the court, to make it a part of the record on appeal. Bank of Bristol *v.* Ashworth, 170.

Dilatory Pleas Not Favored.—See *infra*, "Dilatory Pleas Not Favored."

Objection to Plea Not Equivalent to Motion to Strike Out.—Where defendant in due time filed its plea to the jurisdiction and the same became a part of the record, it could only be expunged from the record on a motion to strike out, and an order of the court, on an objection of plaintiff to the plea, not rejecting the plea, but merely holding that the plea was not good, cannot be held to have supplied the place of the necessary motion to strike out. If there had been a formal motion to reject, such a motion would have been inappropriate because the plea had already become a part of the record. Bank of Bristol *v.* Ashworth, 170.

Record.—Where defendant in due time filed its plea to the jurisdiction, and it was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, it became thereby as much a part of the record as the declaration itself. Bank of Bristol *v.* Ashworth, 170.

Relaxation of Technical Rules.—To construe an objection to a plea to the jurisdiction as a motion to strike out, would be to relax one rule of practice, highly technical it is true, merely to give the other party the benefit of another rule none the less technical, and that too to defeat a substantial right. Bank of Bristol *v.* Ashworth, 170.

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ABATEMENT, REVIVAL AND SURVIVAL—Continued.

Presumptions and Burden of Proof.—Upon a plea to the jurisdiction, or in abatement, just as is the case with other affirmative pleas, the burden of proof is, as a general rule, on the defendant. Builders Supply Co. *v.* Piedmont L. Co., 225.

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Abatement, Revival and Survival.—See ABATEMENT, REVIVAL AND SURVIVAL.

Amendments.—See AMENDMENTS.

Assumpsit.—See ASSUMPSIT.

Assumption of Mortgage Debt.—See MORTGAGES AND DEEDS OF TRUST.

ADEQUATE REMEDY AT LAW.

Deficiency in Quantity of Land.—Courts of equity have jurisdiction to render decrees for the value of the deficiency in the quantity of land sold by the acre. The basis of this jurisdiction is either mutual mistake, or the mistake of one party occasioned by the fraud or culpable negligence of the other. The jurisdiction being elementary, it is immaterial that the complainant has a complete and adequate remedy at law. Austin *v.* Sanders, 209.

ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS. See DECLARATIONS AND ADMISSIONS.

ADVANCEMENTS.

Definition.—It is difficult to frame a definition of the term advancements with accuracy and precision, inasmuch as it is used in both a popular and a technical sense. It has been enlarged in many instances to meet the apparent justice of particular cases and restricted in other instances for the same reason; moreover the statutory enactments of various jurisdictions have to some extent changed its common law meaning. Notwithstanding the difficulty of framing a definition which will cover every case, there are certain well determined and essential elements that are usually accepted as being necessary to the existence of an advancement. Hill *v.* Stark, 280.

In its strictest technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on

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ADVANCEMENTS—Continued.

Definition—Continued.

the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate. Hill *v.* Stark, 280.

Essential Elements.—In general, two elements are essential to constitute an advancement, a gift by the parent to the child and the intention by the donor that the gift shall be an advancement. But the latter may be inferred from the former. Nevertheless, a gift, in contradistinction to a transfer for valuable consideration, is indispensable. Hill *v.* Stark, 280.

What Constitutes.—A contract was entered into between a mother and her son. The contract provided that the mother employed her son as her agent and attorney in fact to manage and control her interest in a partnership between herself and another, according to his judgment and discretion without any interference on the part of the mother. As compensation for his services the son was to receive the profits of the business; and if his mother died during the continuance of the partnership, her interest therein, including her contribution to the capital stock, was to pass to and become the property of the son, and should not pass to her personal representative, but should the son die during the continuance of the contract, then the mother was to have the original capital, but the profits were to go to the son's estate. The son also agreed to pay his mother the interest on the capital invested by her in the partnership during the continuance of the contract. Held: That, in this agreement all the elements of an executory contract between the mother and son were present, and that the contribution by the mother of the capital towards the formation of the partnership was not a gift by the mother to her son, and that he could not be compelled to bring it into hotchpot before participating in his mother's estate. Moreover, from the agreed statement of facts it appeared that the mother did not consider the capital advanced to the partnership part of her estate, or an advancement to her son, so that both of the essential elements of an advancement were wanting. Hill *v.* Stark, 280.

ADVERSE POSSESSION.

Creditors' Suits.—See *infra*, "Lien of Judgments against Former Owner."

Judgment Liens.—See *infra*, "Lien of Judgments against Former Owner."

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ADVERSE POSSESSION—Continued.

Lien of Judgments against Former Owner.—In a creditor's suit the commissioner to whom the cause was referred reported numerous judgments as alive and subsisting liens on the real estate of the judgment debtor. He also reported numerous parcels of real estate liable to the lien of said judgments, and a lot which had been conveyed to the judgment debtor and which had never been conveyed to anyone by him, in the possession of a railway company, which claimed the same by the most notorious acts of adverse possession, exercised by itself and those under whom it claimed. The claim of the railway company to title by adverse possession was decisively supported by all the essential elements of such a title. Its predecessors entered into possession, before the recovery of the judgments referred to, under a color and claim distinctly adverse to, and in no wise in privity with, the title of the judgment debtor, and this possession, in most emphatic manner, had continued exclusively, uninterruptedly, visibly, notoriously, and in hostility to all other titles, for more than twenty-three years before the instant suit was brought, and for nearly thirty years before the judgment creditors asserted any claim of lien upon the property, or attempted by amended pleadings to make the railway company a party. During these decades, the adverse occupants had expended many thousands of dollars in permanent improvements on the premises. Held: That any title to the property claimed by the railway company which could be acquired by virtue of the lien of the judgments asserted in the instant suit would be a title held under the judgment debtor; that the right of action to assert such title would be in terms barred by section 2915 of the Code of 1904; and that the effect of this section cannot be avoided by resorting to a chancery suit. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

In the case at bar the appellants contended that the instant case was one to enforce the lien of a judgment, not an action to recover land, and, therefore, section 2915 of the Code of 1904 did not apply; and that under sections 3567 and 3571, Code of 1904, their lien was valid and enforceable. It is true that under section 3571 of the Code the lien of a judgment may be indefinitely continued against the land of the judgment debtor in his possession, or of others holding titles derived from and in privity with him. But obviously the same rule cannot be applied to strangers who have acquired a perfect legal title not in privity with but adversely to the title of the judgment debtor. In other words, the life

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ADVERSE POSSESSION—Continued.

Lien of Judgments against Former Owner—Continued.

of a judgment may be indefinitely prolonged as to any property upon which it can operate, but whenever the right of the judgment debtor to make an entry on or bring an action to recover any land held adversely is tolled by section 2915, the right of his judgment creditor to subject such land to the satisfaction of his judgment also ceases. The lien is a vested right, but not more so than the title to which the lien attaches, and when the statute destroys the latter it necessarily destroys the former. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Theoretically and technically, a suit to enforce a lien is not a suit to recover land, but a practical and rational application of section 2915 of the Code, in the light of its object and purpose, neither requires nor permits a holding that a lien (which is a mere right to sell a title for debt) stops the statute from running in favor of an adverse occupant and enables the lienor, by a judicial sale, to infuse life into a title which the statute has annihilated. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Assuming, but not deciding, that one who has secured title to property through adverse possession is a proper party in a creditor's suit to enforce the lien of judgments against a former owner of the property, and that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations (section 2915, Code of 1904) must be held to protect the adverse claimant if he shows sufficient facts as to the character and duration of his possession. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Privity with Former Owner.—See *infra*, "Title Conferred by."

Purpose and Policy of the Statute.—The ruling purpose and policy of this statute, which must be looked to in determining its true meaning and effect, is to give stability to land titles. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Title Conferred by.—The adverse occupant who has held for the statutory period does not stand in the position of a grantee from the former true owner, but his occupancy has, by authority of the State speaking through the statute, extinguished all other titles, and has vested in him an absolute and exclusive right to the possession. His title is not in

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ADVERSE POSSESSION—Continued.

Title Conferred by—Continued.

any sense in privity with that of the former owner, and cannot be questioned either by such former owner or by any one claiming through him. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

A true adverse possession for the statutory period confers upon the occupant a new, independent, unincumbered, indefeasible title, a weapon of defense and offense, good alike at law and in equity in all proceedings which call in question its validity or endanger its security. In short, such a title, though not derived from the former owner, is as good as it would be possible to acquire by deed from a former owner of a perfect title, or by a grant from the Commonwealth. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

AFFIDAVITS.

Affidavit of Partnership.—See *infra*, "Filing Affidavits."

Filing Affidavits.—Acts of 1914, page 641, provides that the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended, or supplemental pleading; and that at every stage of the proceeding errors or defects which do not affect the substantial rights of the parties must be disregarded. In the case at bar, plaintiff instituted his action of assumpsit against the defendant as a member of an alleged partnership. Defendant pleaded non-assumpsit, and upon that plea the plaintiff at once took issue, the jury was immediately sworn and the trial proceeded. After all of the evidence had been introduced on behalf of the plaintiff, the greater part of which evidence being for the purpose of proving the alleged partnership, and the plaintiff had announced his case closed, and after the defendant had introduced all of the evidence in his behalf to deny the existence of the alleged partnership, and had announced his case closed, but while both the plaintiff and the defendant, who were the only witnesses in the case, were still in the court room, counsel for plaintiff called the attention of the court to the failure of the defendant to file with his plea the proper affidavit under section 3280, Code of 1904, denying the partnership. Thereupon, on the motion of counsel for the defendant and over the objection and exception of the plaintiff, the court permitted the counsel for the defendant to prepare and file such an affidavit. Held: Under these cir-

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AFFIDAVITS—Continued.

Filing Affidavits—Continued.

cumstances, where neither the evidence nor the facts were certified to the Supreme Court of Appeals so that that court had no facts showing that plaintiff's rights had been injuriously affected, the judgment in favor of the defendant should be affirmed. Dean *v.* Dean, 513.

If the plaintiff had indicated to the court that he had been put in a disadvantageous position, or taken by surprise, and had asked the court for a continuance, the court would doubtless have continued the case on his motion. Certainly this should have been done, if it appeared that he had been taken by surprise. Instead of doing this, however, he went on with the trial, contenting himself with a mere exception to the action of the court in allowing the affidavit to be filed, and took his chances before the jury upon the evidence submitted. Dean *v.* Dean, 513.

AGENCY.

Authority.—See COMMERCIAL TRAVELERS OR DRUMMERS and see *infra*, "Declarations and Admissions."

While, as between principal and agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third parties ignorant thereof; and as between the principal and agent and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority. Lysle Milling Co. *v.* Holt & Co., 565.

Commercial Travelers or Drummers.—See COMMERCIAL TRAVELERS OR DRUMMERS.

Commission Merchants.—See FACTORS AND COMMISSION MERCHANTS.

Commissions.—A contract of agency provided that the compensation of the agent of a manufacturer of fertilizer should be $2.00 per ton on all sales of fertilizer by him, with additional compensation of a bonus of $500.00 when the agent should

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AGENCY—Continued.

Commissions—Continued.

sell, collect and settle with the manufacturer for as much as 1,000 tons of the fertilizer. The agent was to endorse notes of farmers taken for all sales of fertilizer on time. The manufacturer became entitled to the custody and control of the notes under the provisions of the contract, because the agent, without the consent of the manufacturer, ceased to pay any attention to the business of the agency and accepted other employment in another State. Held: That, the withdrawal of the notes by the manufacturer and the undertaking of the collection of them by him to the exclusion of the agent, was not a breach of the contract on the part of the manufacturer. Ober & Sons Co. *v.* Wm. G. Smith, 311.

A contract of agency provided that the compensation of the agent of a manufacturer of fertilizer should be $2.00 per ton on all sales of fertilizer by him, with an additional compensation of a bonus of $500.00 when the agent should sell, collect and settle with the manufacturer for as much as 1,000 tons of the fertilizer. The agent sold more than 1,000 tons of fertilizer but did not collect for 1,000 tons. Further, the agent breached his contract with the manufacturer by accepting employment in another State and giving no further attention to the business of the agency or the collections. Held: That this breach of contract by the agent abrogated the promise in respect to the bonus. Ober & Sons Co. *v.* Wm. G. Smith, 311.

Declarations and Admissions.—While the declarations of an alleged agent are inadmissible to prove agency, if the agency be otherwise prima facie proved, they become admissible in corroboration. Lysle Milling Co. *v.* Holt & Co., 565.

Instructions Not Certified.—Before the Supreme Court of Appeals can hold that the giving of an isolated instruction constituted reversible error, in a case where all the instructions are certified, it will have to clearly appear that the instruction in itself was vitally wrong, and that other instructions could not have cured the error. Lysle Milling Co. *v.* Holt & Co., 565.

Real Estate Brokers.—See REAL ESTATE BROKERS.

Revocation of Authority.—If no term of service has been agreed upon, the principal may at any time revoke the authority of his agent, so far as it relates to things to be done and remaining unexecuted, unless the authority is coupled with an interest or conferred for a valuable consideration to the principal. Casey *v.* Walker, 465.

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AGENCY—Continued.

Revocation of Authority—Continued.

To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power, must be vested in the person to whom the agency, or pow-r, is given, so that he may deal with it in his own name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent. There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation. Casey *v.* Walker, 465.

AMENDMENTS.

Appeal and Error.—Where in point of fact a case was disposed of on issues raised on the original bill and answer, no notice being taken of the amended bill in the decree, defendants were not prejudiced by the action of the court in permitting the amended bill to be filed, and in not dismissing it on demurrer and answer. Stewart *v.* Stewart, 642.

Discretion of Court.—A very large discretion is vested in the trial courts as to the time of filing and perfecting pleadings, and the Supreme Court of Appeals will not reverse a case unless the action is clearly erroneous and harmful. Dean *v.* Dean, 513.

Filing Affidavits.—See AFFIDAVITS.

Joinder of Parties.—See *infra*, "Substitution of New Party."

Liberality in Allowing.—It is the settled policy of our law to allow amendments in pleadings and to disregard defects in procedure which do not operate to the prejudice of the substantial rights of the opposite party. Carpenter *v.* Meredith, 446.

Illustration of the general rule that defects in allowing amendments will be disregarded where they do not operate to the prejudice of the substantial rights of the opposite party. Carpenter *v.* Meredith, 446.

Limitation of Actions.—It was urged that the insulting words attributed to the defendant in the first count of the amended declaration constituted a new cause of action. If this position was sound, the plea of the statute was good, because the words were alleged to have been uttered at a date more than twelve months prior to the amendment. A careful comparison of the original and amended averments, how-

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AMENDMENTS—Continued.

Limitation of Actions—Continued.

ever, lead the Supreme Court of Appeals to the conclusion that the new matter had reference to and was merely an amplification of the charges contained in the original, and that the case did not, as claimed by the defendant, fall within the influence of the decision of that court in Irvine *v.* Barrett, 119 Va. 587, 89 S. E. 904. Carpenter *v.* Meredith, 446.

Misjoinder of Parties.—See *infra*, "Substitution of New Party."

New Cause of Action.—At common law the courts had no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action. Norfolk So. R. Co. *v.* Greenwich Corp., 631.

Substitution of New Party.—An entirely new plaintiff cannot be substituted after it has become manifest that the original plaintiff could not maintain the action, the proper practice in such a case would have been for the plaintiff to ask to be allowed to suffer a non-suit before the jury retired, under section 3387 of the Code of 1904, and to have renewed the suit in the name of the proper plaintiff. Norfolk So. R. Co. *v.* Greenwich Corp., 631.

Sections 3259, 3260, of the Code of 1904, and Acts 1914, page 641, plainly do not contemplate the substitution of entirely new plaintiffs, but are rather intended to apply to amendments involving amplified and supplemental statements of the original action, and in furtherance of its object. They were never intended to permit the substitution of a new cause of action. The circumstance that in the case at bar the substituted plaintiffs owned the stock of the original plaintiff, a corporation, did not affect the question. The corporation was a separate entity from its stockholders, with power to sue and be sued; and, certainly in a legal forum, they stood in the same relation to each other as any other litigants. Norfolk So. R. Co. *v.* Greenwich Corp., 631.

Withdrawal.—The second amended declaration was withdrawn on the day on which it was filed. The cause stood practically as if the second amendment had never been filed. The filing and immediate withdrawal of the latter could not have prejudiced the defendant. Carpenter *v.* Meredith, 446.

AMOUNT IN CONTROVERSY. See APPEAL AND ERROR.

ANNEXATION. See COUNTIES.

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APPEAL AND ERROR.

Affidavit of Partnership.— See AFFIDAVITS.

Affirmance.— See *infra*, "Certification of Evidence;" "Conflicting Evidence;" "Reversal."

Evidence Other Than That Objected to Sufficient to Sustain Verdict.—See *infra*, "Evidence Other Than That Objected to Sufficient to Sustain Verdict."

Weight Attached to Decree of Trial Court.—An appellate court will not reverse the decree of a trial court, which is entitled to great weight, unless satisfied that it is wrong. The burden is upon the party complaining to show error and to satisfy the appellate court of such error. Morrisette *v.* Cook & Bernheimer Co., 588.

Weight Attached to Finding of Jury.—In a case where there was no certain standard for the admeasurement of the damages to be assessed, and there was serious conflict in the testimony as to the amount of the damages inflicted, an issue of fact was awarded. The sole question submitted to the jury was the amount of damages to be awarded the plaintiffs for the injury sustained and to be sustained, by reason of the acts done and proposed to be done by the defendant. No other question was submitted to them. Their assessment of the damages was approved by the trial court, and where this is the case, and no error is pointed out in the action of the court or the conduct of the case, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it. Norfolk & W. R. Co. *v.* Allen, 603.

Amendments.—Where in point of fact a case was disposed of on issues raised on the original bill and answer, no notice being taken of the amended bill in the decree, defendants were not prejudiced by the action of the court in permitting the amended bill to be filed, and in not dismissing it on demurrer and answer. Stewart *v.* Stewart, 642.

Amount in Controversy.—See *infra*, "Corporation Commission."

In an action of assumpsit to recover excess freight charges on creosote, it was entirely competent for the plaintiffs to claim interest or not as they chose, and the trial court was powerless to make them claim it on demand of defendant, there being no evidence of a purpose to defeat the jurisdiction of a court of record by the release of a part of a demand previously asserted. Consequently, where the amount in controversy, without interest, was beneath the jurisdictional limit of the Supreme Court of Appeals, a writ of error must be dismissed as improvidently awarded, unless

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APPEAL AND ERROR—Continued.

Amount in Controversy—Continued.

jurisdiction can be shown on some other ground than the amount in controversy. Ches. & O. R. Co. *v.* Williams, 502.

Assignment of Error.—See ASSIGNMENT OF ERROR.

Bill of Exceptions.—*Omission from Record.*—See *infra*, "Record."

Certificates of Exception.—Assignments of error as to the overruling or sustaining of objections to the reception of testimony, cannot be considered in the appellate court where they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708). Walters *v.* Norfolk & W. Ry. Co., 149.

Certification of Evidence.—Where the evidence and not the facts are certified, the case stands in the Supreme Court of Appeals as on a demurrer to the evidence by the plaintiff in error. Abernathy *v.* Emporia Mfg. Co., 406.

Where the evidence is certified, the Supreme Court of Appeals will consider the whole evidence and sustain the verdict, unless it be against the law and the evidence, or without evidence. Carter *v.* Washington & Old Dom. Ry., 458.

Certification of Instructions.—See *infra*, "Instructions Not Certified."

Commissioner's Report.—See *infra*, "Report of Commissioner."

Conclusiveness of Verdict.—Under section 3484, Code of 1904, the case of the plaintiff in error was before the Supreme Court of Appeals as upon a demurrer to the evidence, and the rule is settled by numerous decisions of that court that the verdict of a jury will not be set aside on writ of error where, when so considered, there is sufficient evidence to support it. Webb *v.* Commonwealth, 899.

Upon a charge of transporting or bringing into the State liquor in violation of the prohibition act, where the defense is that the transportation was interstate commerce, the jury has the right to discredit the testimony of accused, and the issue having been fairly submitted to them, their verdict will not be disturbed upon appeal. Lucchesi *v.* Commonwealth, 872.

Conflicting Evidence.—See NEW TRIALS.

Where the evidence is in conflict as to the charges of negligence against defendant, and the verdict and judgment of the court below is for the plaintiff, the Supreme Court of Appeals will assume that the negligence of the defendant was established. Va. Ry. & P. Co. *v.* Boltz, 649.

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APPEAL AND ERROR—Continued.

Corporation Commission.—The State Corporation Commission had prescribed no rate on creosote oil in steel drums. The commission had, however, provided that "articles not enumerated will be classified with analogous articles." In an action of assumpsit to recover excess freight charges on creosote shipped from Richmond to Norfolk, the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged. Held: That the judgment did not in any way call in question any action of the State Corporation Commission and accordingly was not in contravention of section 156 of the Constitution. If it be conceded that the court plainly erred in its classification. it was an error of judgment in the determination of the rights of the parties, which cannot be reviewed by the Supreme Court of Appeals when the amount in controversy is less than $300. Ches. & O. R. Co. *v.* Williams, 502.

Criminal Law.—*Verdict Contrary to the Evidence.*—Where neither the evidence introduced on the trial nor the facts proved are before the Supreme Court of Appeals, either by bill of exceptions or other certification, an objection that the verdict is contrary to the evidence cannot be considered by that court. Wilkerson *v.* Commonwealth, 920.

Demurrer to Evidence.—Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal. Ches. & O. R. Co. *v.* National Bk., 471.

Depositions.—In a suit for damages for diminution of water power, where an issue to a jury was awarded to determine the amount of damages to be awarded to the plaintiffs for the injuries sustained, the Supreme Court of Appeals will not treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions. Norfolk & W. R. Co. *v.* Allen, 603.

Evidence.—See *infra*, "Rules of Decision."

Upon the trial of a cause involving the genuineness of a will, the contestants of the will offered a witness to prove certain declarations of the testatrix made subsequent to the date of the alleged will, accompanying the offer with an avowal by counsel that he expected to show by the witness that from the declarations of the testatrix, that the testatrix "could not have known of this will." The record did not show what the alleged declarations of the testatrix were,

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APPEAL AND ERROR—Continued.

Evidence—Continued.

therefore the Supreme Court of Appeals must assume from the avowal that they were such as would have tended to show that the testatrix could not have known of the will. Samuel *v.* Hunter's Ex'x, 636.

Evidence Not before Appellate Court.—Where neither the evidence introduced on the trial nor the facts proved are before the Supreme Court of Appeals, either by bill of exceptions or other certification, an objection that the verdict is contrary to the evidence cannot be considered by that court. Wilkerson *v.* Commonwealth, 920.

Evidence Other Than That Objected to Sufficient to Sustain Verdict.—Where the evidence in the case, independent of testimony drawn in question by two assignments of error, was sufficient to sustain the verdict of the jury it is unnecessary for the appellate court to pass upon the questions raised by these assignments of error. Ches. & O. R. Co. *v.* Ware, 246.

Exceptions and Objections.—See *infra*, "Evidence Other Than That Objected to Sufficient to Sustain Verdict;" "Point Raised for First Time on Appeal."

Although evidence might, upon objection, have been properly excluded as hearsay evidence, where no objection was offered to its introduction, it must, on appeal, be regarded as a part of the evidence before the jury. Taylor *v.* Commonwealth, 886.

Fires.—See FIRES.

Former Adjudication or Res Adjudicata.—See FORMER ADJUDICATION OR RES ADJUDICATA.

Harmless Error.—*Where upon two trials* both verdicts were in favor of the defendant, and in the appellate court he vigorously insisted upon the correctness of the last verdict as the Supreme Court of Appeals was of opinion that he was right in this contention and that the judgment on the last verdict should be affirmed, defendant could not have been hurt by his involuntary waiver of his bill of exceptions to the action of the court in setting aside the first verdict. McClung *v.* Folkes, 48.

Criminal Law.—Where both prisoners were convicted by the jury under instructions which permitted them to find the prisoners guilty of a higher offense, and one carrying a higher maximum and minimum punishment than that with which they were charged, the error cannot be said to be

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APPEAL AND ERROR—Continued.

Harmless Error—Continued.

Criminal Law.—Continued.

harmless, where the jury did not impose the minimum penalty prescribed by the statute for the offense with which they were charged. Hummer *v.* Commonwealth, 826.

Substitution of Instructions.—Although an instruction requested by defendant was correct as a statement of abstract legal propositions, and the court would not have erred in giving it, there was no reversible error in the substitution of another instruction which was a clear, correct and adequate statement of the law from the defendant's standpoint as applied to the facts of the case in hand. Fitzgerald *v.* So. Farm Agency, 264.

Infants.—See *infra*, "Reformatories."

Instructions.—See *infra*, "Invited Error."

A defect in one instruction is not cured by a correct statement of the law in another, where the appellate court is unable to say that the jury could not have been misled by the defective instruction. Abernathy *v.* Emporia Mfg. Co., 406.

Instructions Not Certified.—In the case at bar, the particular instruction complained of was susceptible of application to more than one feature of the evidence. The instruction itself, taken with another which was admittedly given, shows that the jury could not have been misled by it upon the decisive and only really controverted question of the agent's authority to make sales of flour without confirmation, and the instructions as a whole might have still further remedied the error complained of, if error it was. Lysle Milling Co. *v.* Holt & Co., 565.

Invited Error.—An instruction in effect told the jury that, after a servant had called his master's attention to a particular danger at his place of work and was told by the master that he must continue to work, and that when other work that was then in progress was completed this particular danger would be removed, if the servant continued to work in these circumstances, so far as this particular danger was concerned, he continued at his own peril. Held: That, this instruction went as far as the court could go upon the master's theory as to this particular danger. Whether it did not go too far in that respect was a question which the appellate court did not decide, because it was given at the instance of the appellant. Va. Portland Cement Co. *v.* Swisher, 123.

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APPEAL AND ERROR—Continued.

Invited Error—Continued.

Where accused in a requested instruction introduced unnecessary matter not essential to the defense relied on and with reference to which the Commonwealth had introduced no evidence, he cannot complain that the court inadvertently allowed it to remain therein. Lucchesi *v.* Commonwealth, 872.

Issue of Fact.—See *infra*, "Depositions."

Judgment by Appellate Court.—If the court below erred in setting aside a verdict for the plaintiff, as contrary to the law and the evidence, the Supreme Court of Appeals will enter the judgment thereon which the trial court should have entered. Carter *v.* Washington & Old Dom. Ry., 458.

Jurisdiction.—Where the record shows that the trial court had no jurisdiction over the defendant, then a judgment against him is plainly wrong, and must be reversed. Bank of Bristol *v.* Ashworth, 170.

Law of the Case.—See "LAW OF THE CASE."

Leading Question.—Great latitude is allowed trial courts in the matter of the examination of witnesses and their rulings thereon will not be reversed unless clearly prejudicial to the party excepting. Ordinarily, permitting a leading question to be asked is no ground for reversal. Abernathy *v.* Emporia Mfg. Co., 406.

More Than One Trial.—See *infra*, "Successive Trials."

Negligence.—See *infra*, "Conflicting Evidence."

Objections Not Raised Below.—***Hypothetical Question.***—Suggestions as to the insufficiency of the hypothetical questions which are made in the petition for writ of error and brief of counsel should have been made in the trial court, and it is too late to make such suggestions for the first time on appeal. Bowen's Ex'or *v.* Bowen, 1.

Omission of Bills of Exception from Record.—See *infra*, "Record."

Commissioner's Report.—Where on the face of the report of a commissioner no error is apparent, and no exception thereto was taken by appellant in the court below, it is too late to raise the objection on appeal. The evidence in the cause cannot be looked to by the appellate court to ascertain whether the commissioner's conclusions were sustained or not sustained by the evidence. The conclusion of the commissioner and the adjudication of the court below based thereon are final and conclusive upon the appellant and are not open to review in the appellant court. Ober & Sons Co., *v.* Wm. G. Smith, 311.

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APPEAL AND ERROR—Continued.

Question Raised for First Time on Appeal.—See *infra*, "Objections Not Raised Below."

Record.—See *infra*, "Certification of Evidence;" "Instructions Not Certified."

Omission of Bills of Exception from Record.—A motion to dismiss a writ of error was based upon the fact that the petition, when presented to the judge awarding the writ, was not accompanied by a complete transcript of the record, as by some inadvertence the bills of exception were omitted. Afterwards and before the motion was presented to the court the plaintiffs in error applied to one of the judges of the Supreme Court of Appeals under section 3463, of the Code of 1904, for a writ of *certiorari*, requiring the clerk to transmit such portions of the record as had been theretofore omitted from the transcript. In response to this writ, the record was completed long before the motion was made, and was amply sufficient to present for the consideration of the court all of the errors which were assigned in the petition. The motion to dismiss the writ was therefore overruled. Bowen's Ex'or *v.* Bowen, 1.

Reformatories.—If substantially the proceedings prescribed by chapter 350, Acts 1914, page 696, had been followed in the instant case, and if notice thereof had been given to the petitioner, the father of the children, the lower court would have had jurisdiction to proceed with the case and to have entered the order committing the children to the custody of the Children's Home Society of Virginia, and although there might have been error therein, such error could not have been inquired into or reviewed by the Supreme Court of Appeals in a proceeding by application for a writ of *habeas corpus*, but only by appeal from such order. *Ex-Parte* Mallory, 298.

Report of Commissioner.—See *infra*, "Objections Not Raised Below."

A contract of agency provided that the compensation of the agent of a manufacturer of fertilizer should be $2.00 per ton on all sales of fertilizer by him, with additional compensation of a bonus of $500.00 when the agent should sell, collect and settle with the manufacturer for as much as 1,000 tons of the fertilizer. The agent was to indorse notes of farmers taken for all sales of fertilizer on time. The manufacturer became entitled to the custody and control of the notes under the provisions of the contract, because the agent, without the consent of the manufacturer, ceased to pay any attention to the business of the agency and accepted other

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APPEAL AND ERROR—Continued.

Report of Commissioner—Continued.

employment in another State. Held: That the withdrawal of the notes by the manufacturer and the undertaking of the collection of them by him to the exclusion of the agent, was not a breach of the contract on the part of the manufacturer. Ober & Sons Co. *v.* Wm. G. Smith, 311.

The report of a commissioner in chancery on the value of property, on conflicting evidence, sustained by the circuit court, cannot be properly overruled on appeal. The report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight and should not be disturbed unless its conclusions are clearly at variance with the evidence. Va. L., etc. Co. *v.* O. D. McHenry L. Co., 111.

Reversal.—See *infra*, "Affirmance;" "Instructions."

Where substantial justice has been reached and the rights of all parties in interest have been adequately safeguarded by the decree appealed from, the Supreme Court of Appeals will not be astute to find technical objections by which such decree may be reversed. Smith *v.* Woodward, 356.

Rule as on Demurrer to Evidence.—Where no exception was taken to the granting or refusing of instructions, and no objection was made in the Supreme Court of Appeals to the ruling of the trial court on the admission or rejection of evidence, the sole errors assigned being the refusal of the court to set aside the verdict as contrary to the evidence, and the judgment against the plaintiff for the entire costs of the litigation, the judgment must be sustained, if there is evidence to support it. It is insufficient that the Supreme Court of Appeals upon the evidence, if they had been the jury, would have found a different verdict, where the court from the record is unable to say that manifest injustice has been done, or that the verdict is without evidence to support it. McClung *v.* Folkes, 48.

Want of Jurisdiction.—See *infra*, "Jurisdiction."

Leading Question.—See *infra*, "Leading Question."

Rules of Decision.—On error to a judgment for plaintiff in an action for negligence, the evidence of plaintiff's witnesses, so far as at all credible, must be accepted by the appellate court. Va. Ry. & P. Co. *v.* Boltz, 649.

Second Trial.—See *infra*, "Successive Trials."

Successive Trials.—Where upon the second trial of a case a verdict in favor of the plaintiff was set aside as contrary to the

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APPEAL AND ERROR—Continued.

Successive Trials—Continued.

law and the evidence, to which action the plaintiff excepted, and upon the third trial no evidence was introduced and there was a verdict for the defendant, and the plaintiff assigned as error the action of the trial court in setting aside the verdict of the jury on the second trial, and the entering of judgment for the defendant on the third trial, the established rule is that the Supreme Court of Appeals will look first to the record of the second trial, and if there was error in setting aside that verdict, no further inquiry will be made and judgment will be entered by that court thereon. Carter *v.* Washington & Old Dom. Ry., 458.

Verdict.—See *infra*, "Conclusiveness of Verdict."

APPEARANCE.

Attorney and Client.—It was objected to a plea to the jurisdiction that it was not good in form because the defendant corporation appeared in person instead of by attorney. The commencement of the plea was, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the commencement of all pleas, Code, section 3269, and the signature of the plea was, "Bank of Bristol, Inc., By A. B. Whiteaker, attorney." Held: That the objection was not well founded in point of fact. Bank of Bristol *v.* Ashworth, 170.

ARGUMENTS OF COUNSEL.

Impeachment of Witness.—See WITNESSES.

Conduct of Counsel.—In cross-examining a witness defendant's counsel said: "I know, Mr. Turner, this situation myself. and there are others who know it, and I want to ask you to see if we coincide." Held: That this could not have prejudiced the plaintiff. Abernathy *v.* Emporia Mfg. Co., 406.

Financial Standing of Defendant.—In an action against a railroad company for diminution of plaintiffs' water power, there was no evidence before the jury as to the wealth of the defendant, but counsel for plaintiffs in his address to the jury was allowed to comment over defendant's objections upon the great wealth of the defendant and its disregard of the law of God and man. Held: Error. Norfolk & W. R. Co. *v.* Allen, 603.

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ARGUMENTS OF COUNSEL—Continued.

Going Outside of the Record.—It is never permissible for counsel to go outside of the record and testify as to matters not given in evidence, nor, in any case, to make use of language calculated to inflame the minds of the jurors and induce a verdict not founded solely on the evidence adduced before them. Norfolk & W. R. Co. *v.* Allen, 603.

Statements Calculated to Inflame the Minds of Jurors.—The Supreme Court of Appeals has more than once reprobated in no uncertain terms the practice of injecting into arguments of counsel statements calculated to inflame the minds of jurors, and tending to produce verdicts as a result of prejudice rather than a calm consideration of the evidence. Every litigant, natural or artificial, is entitled to a fair and impartial trial, and there should be excluded from the tribunal which is to try the case, whether judge or jury, everything that has no tendency to aid such tribunal in doing impartial justice between the litigants. Norfolk & W. R. Co. *v.* Allen, 603.

ARRAIGNMENT. See CRIMINAL LAW.

ASSAULT AND BATTERY.

Malice.—Defendants were indicted upon the charge of having "unlawfully and feloniously" cut and wounded another. The indictments contained no charge of "malicious" cutting. After the prisoners had been arraigned and had each entered a plea of not guilty, the clerk read the indictments to the jury, and, in charging them as to the punishment for the alleged offense, read to them, over the objection of counsel, section 3671 of the Code of 1904. This section provides that if any person *maliciously* cuts or wounds another, with intent to maim, disfigure, disable, or kill, he shall be punished by confinement in the penitentiary not less than one nor more than ten years. But if the act be done unlawfully, but *not maliciously*, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars. The court also refused an instruction requested by counsel for defendants that under the indictment defendants could not be found guilty of *maliciously* cutting or stabbing. Held: That the court erred in permitting the clerk to read to the jury section 3671 without explaining to them that they were not to regard that portion of it which related to the punishment for maliciously doing the acts therein described; and, further, that it was error, in these circumstances, to refuse the instruction requested. Hummer *v.* Commonwealth, 826.

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ASSAULT AND BATTERY—Continued.

Res Gestae.—A witness testified that when he arrived at defendant's house, defendant's small boy ran out of the house crying, turned immediately and ran back inside and exclaimed, "Don't Father! Don't Father!" and came right out again, saying, "Father is beating mother." Held: That this testimony as to the spontaneous and simultaneous outcry of the little boy was clearly admissible as part of the *res gestae*. Taylor *v.* Commonwealth, 886.

ASSESSMENT. See TAXATION.

ASSIGNMENT OF ERRORS.

Certificates of Exception.—Assignments of error as to the overruling or sustaining of objections to the reception of testimony, cannot be considered in the appellate court where they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708). Walters *v.* Norfolk & W. Ry. Co., 149.

Evidence Other Than That Objected to Sufficient to Sustain Verdict.—Where the evidence in the case, independent of testimony drawn in question by two assignments of error, was sufficient to sustain the verdict of the jury, it is unnecessary for the appellate court to pass upon the questions raised by these assignments of error. Ches. & O. R. Co. *v.* Ware, 246.

ASSIGNMENTS.

Equitable Assignments.—See *infra*, "Orders."

Judgments.—See *infra*, "Orders."

Orders.—A mother gave to her daughter an order upon her attorneys in the following language: "Messrs. D. Wampler Earman & Swank, (attorneys at law), will please pay to Mrs. M. J. Gardner, or order, one thousand five hundred dollars and charge same to my account." The attorneys of the mother had previously recovered for her a judgment against her son for $2,700, which was all the property she owned then or thereafter until the date of her death. The judgment was not collected by the attorneys for the mother, but was paid in full to her administrator some time after her death, and an action was brought upon the order by the daughter against the administrator. Held: That the daughter could not recover against the administrator, as the writing in question did not operate either as a gift or an equitable assignment of a part of the judgment. Gardner *v.* Moore's Adm'r, 10.

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ASSIGNMENTS—Continued.

Orders—Continued.

The instrument described in the preceding syllabus does not purport to be an assignment, and makes no mention of the judgment or other fund out of which it is to be paid. It measures up exactly to what section 126 of the negotiable instruments law declares to be bill of exchange, and which by the next section it declares, "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof." Code, section 2841-a, clauses 126, 127. The court cannot declare that to be a common law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the statute says it shall not so operate. The fact that the donor had no other estate than the judgment cannot affect the legal interpretation of the instrument of supposed donation. The same results would have followed if the donor had used an insufficiently executed will as the instrument of donation. As the instrument was not an assignment delivery of it was not a sufficient delivery to complete the gift. Gardner *v.* Moore's Adm'r, 10.

ASSUMPSIT.

Assumption of Mortgage Debt.—Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. But in the instant case there was no property or money in the hands of the grantee, as the property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency; therefore, the foregoing rule has no application to the instant case. Thacker *v.* Hubard, 379.

Mortgages and Deeds of Trust.—See *infra*, "Assumption of Mortgage Debt."

Trespass on the Case or Assumpsit.—Where in the caption of a declaration the formal statement is made that plaintiff complains of the defendant "of a plea of trespass on the case," omitting the further words "in assumpsit," but the body of both of the two counts of the declaration allege a contract of carriage and the breach of it as the cause of action, the declaration must be considered as in assumpsit. Ches. & O. R. Co. *v.* National Bk., 471.

When Action Lies.—*Assumpsit* does not lie in any case except when damages are sought for the breach of a contract, express or implied. Casey *v.* Walker, 465.

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ASSUMPTION OF MORTGAGE DEBT. See MORTGAGES AND DEEDS OF TRUST.

ATTORNEY AND CLIENT. See ARGUMENTS OF COUNSEL.

Appearance.—It was objected to a plea to the jurisdiction that it was not good in form because the defendant corporation appeared in person instead of by attorney. The commencement of the plea was, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the commencement of all pleas, Code, section 3269, and the signature of the plea was, "Bank of Bristol, Inc., *By* A. B. Whiteaker, attorney." Held: That the objection was not well founded in point of fact. Bank of Bristol *v.* Ashworth, 170.

BANKS AND BANKING.

Taxation of Bank Stock.—See TAXATION.

BILL OF EXCEPTIONS. See EXCEPTIONS, BILL OF.

BILL OF PARTICULARS.

Indictment and Information.—The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. Wilkerson *v.* Commonwealth, 920.

Larceny.—An indictment for larceny charged in one count the larceny of a check for a certain amount, the property of another person, under section 3708, Code of 1904, and in another count the larceny of that amount of money, the property of the same person. The accused moved the court to require the Commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check. Held: That the court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged. Allen *v.* Commonwealth, 834.

Set-Off, Recoupment and Counterclaim.—The remedy of the plaintiffs to obtain further particulars of the set-off claimed by the defendants was by motion for a bill of particulars under section 3249 of the Code of 1904, and not by objection to the plea. New Idea Co. *v.* R. M. Rogers & Sons, 54.

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BILLS, NOTES AND CHECKS.

Assignments.—See *infra*, "Negotiable Instruments Law."

General Issue.—See SALES.

Negotiable Instruments Law.—A mother gave to her daughter an order upon her attorneys in the following language: "Messrs. D. Wampler Earman & Swank, (attorneys at law), will please pay to Mrs. M. J. Gardner, or order, one thousand five hundred dollars and charge same to my account." The attorneys of the mother had previously recovered for her a judgment against her son for $2,700, which was all the property she owned then or thereafter until the date of her death. The judgment was not collected by the attorneys for the mother, but was paid in full to her administrator some time after her death, and an action was brought upon the order by the daughter against the administrator. Held: That the daughter could not recover against the administrator, as the writing in question did not operate either as a gift or an equitable assignment of a part of the judgment. Gardner *v.* Moore's Adm'r, 10.

The instrument described in the preceding syllabus does not purport to be an assignment, and makes no mention of the judgment or other fund out of which it is to be paid. It measures up exactly to what section 126 of the negotiable instruments law declares to be bill of exchange, and which by the next section it declares, "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof." Code, section 2841-a, clauses 126, 127. The court cannot declare that to be a common law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the statute says it shall not so operate. The fact that the donor had no other estate than the judgment cannot affect the legal interpretation of the instrument of supposed donation. The same results would have followed if the donor had used an insufficiently executed will as the instrument of donation. As the instrument was not an assignment, delivery of it was not a sufficient delivery to complete the gift. Gardner *v.* Moore's Adm'r, 10.

Plea.—See SALES.

BOARD OF SUPERVISORS. See COUNTIES.

BOOKS AS EVIDENCE. See DOCUMENTARY EVIDENCE.

BRANCH OR LATERAL ROADS. See RAILROADS.

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BROKERS.

Real Estate Brokers.—See REAL ESTATE BROKERS.

BURDEN OF PROOF. See PRESUMPTIONS AND BURDEN OF PROOF.

CARRIERS.

Carriers of Goods.—See CARRIERS OF GOODS.

Connecting Carriers.—See CONNECTING CARRIERS.

Demurrer to Evidence.—Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal. Ches. & O. R. Co. *v.* National Bk., 471.

Interstate Commerce.—See CONNECTING CARRIERS.

Live Stock.—See CARRIERS OF LIVE STOCK.

Passengers.—See CARRIERS OF PASSENGERS.

Res Ipsa Loquitur.—See CARRIERS OF PASSENGERS.

Tariff Regulation.—See CONNECTING CARRIERS.

Telegraphs and Telephones.—See TELEGRAPHS AND TELEPHONES.

CARRIERS OF GOODS.

Burden of Proof.—See *infra*, "Exception in Contract."

Contract of Carriage.—In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose, which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, State or Federal, in which case, the contract will be implied in law from the duty imposed by the common law or by statute. Ches. & O. R. Co. *v.* National Bk., 471.

Exception in Contract.—See CARRIERS OF LIVE STOCK.

Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal. Ches. & O. R. Co. *v.* National Bk., 471.

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CARRIERS OF GOODS—Continued.

Exception in Contract—Continued.

In an action against a carrier for injury to inanimate goods consigned to it for carriage, where the carrier relies upon a special contract exempting it from liability, the burden of proof is on the carrier to prove that the injury falls within the exception contained in the special contract. Ches. & O. R. Co. *v.* National Bk., 471.

Implied Contracts.—See CONNECTING CARRIERS.

Interstate Commerce.—See CONNECTING CARRIERS.

Since Congress has occupied the whole field of interstate commerce by virtue of the interstate commerce act and its amendments, those statutes have superseded all State legislation on the subject and they and their construction must be alone looked to in the ascertainment of the rights of parties litigant in all actions, such as that in the instant case, involving an interstate shipment. Ches. & O. R. Co. *v.* National Bk., 471.

Presumptions and Burden of Proof.—See *infra*, "Exception in Contract."

Right of Action.—See *infra*, "Contract of Carriage."

CARRIERS OF LIVE STOCK.

Exception in Contract.—See CARRIERS OF GOODS.

In an action against a carrier for injury to a shipment of live stock, where a contract exception is relied on as a defense, the burden of proof, at the least, is on the carrier in two particulars, namely: (a) It must prove that, at the time the injury may have occurred, the special contract exception relied on was in operation; and (b) it must at least prove (unless such fact appears from the plaintiff's evidence) that the injury was of such a nature that it may, with equal probability, in accordance with the evidence have been occasioned by causes which were within the contract exception relied on. Certainly this is true where the proof of the plaintiff shows that the injury was due to human agency. Ches. & O. R. Co. *v.* National Bk., 471.

A contract of carriage contained the following exception: "The shipper at his own risk and expense shall load and unload said live stock and in case any person shall accompany said live stock in charge of the same, (shall) take care of, feed and water said live stock while being transported, whether delayed in transit or otherwise * * * " The evidence for plaintiff was that the cars containing the stock were not over-crowded or over-loaded; that the stock was in

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CARRIERS OF LIVE STOCK—Continued.

Exception in Contract—Continued.

sound and good condition when delivered to defendant for transportation; that the injury to it apparent on its arrival at destination was of such nature that the jury were warranted in drawing the inference of fact that such injury was not occasioned by negligence in loading or unloading or in lack of care of it by any person accompanying the stock in charge of it, or from lack of feed or water. There was evidence for defendant in conflict with that of the plaintiff, but as the case was heard on the demurrer to the evidence, such conflicting evidence could not be considered. Held: That the defendant had not proved by any evidence before the court that the injury complained of was of such a nature that it might with equal probability have been occasioned by causes which were within the exception from liability clause of the contract relied on by defendant. On the contrary, the evidence for the plaintiff established the affirmative fact that such injury was of such nature that it was not occasioned by causes within the exception. Ches. & O. R. Co. *v.* National Bk., 471.

Implied Contracts.—If no express contract had been made with a carrier of live stock and the stock had been received by it for transportation, that state of facts would have constituted it the initial carrier for the entire route under the interstate commerce law as amended, and that carrier could alone have been sued for injury to the live stock en route, notwithstanding any subsequent contract of carriage between the consignee and an intermediate connecting carrier. But in the case at bar such were not the facts, for the live stock had been shipped under a shipper's order contract. Ches. & O. R. Co. *v.* National Bk., 471.

Interstate Commerce.—See CONNECTING CARRIERS.

Presumptions and Burden of Proof.—See *infra*, "Exception in Contract."

CARRIERS OF PASSENGERS.

Contributory Negligence.—See *infra*, "Postal Clerk."

Invalids.—See *infra*, "Res Ipsa Loquitur."

A carrier is not required to accept upon its cars, without an attendant, persons who, because of some physical or mental infirmity, are incapable of properly caring for themselves. Walters *v.* Norfolk & W. Ry. Co., 149.

If an unattended person, who is so sick, aged or otherwise infirm as to be unable to assist or care for himself, be ac-

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CARRIERS OF PASSENGERS—Continued.

Invalids—Continued.

cepted as a passenger, the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition. Walters *v.* Norfolk & W. Ry. Co., 149.

Liability for Injuries.—A carrier is not an insurer of the safety of its passengers. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

Mail Clerk.—See *infra*, "Postal Clerk."

Postal Clerk.—A postal clerk upon a railway mail car is a passenger, and therefore, entitled to the very highest degree of care from the carrier. Carter *v.* Washington & Old Dom. Ry., 458.

If in the case at bar, the plaintiff, a railway mail clerk, went to the door of the poorly lighted car in the performance of his duties, while the train was in motion, knowing that the safety bar had been removed, and was thrown out of the car because he failed to take proper precautions for his own safety, then it is clear that he was guilty of such contributory negligence as bars any recovery. On the other hand, if under such circumstances he went to the door of the car, not knowing that the safety bar upon which he had been accustomed to rely had been removed, and without any contributory negligence on his part, sustained the injury complained of, as appears from his testimony, then he is entitled to recover. Carter *v.* Washington & Old Dom. Ry., 458.

Presumption of Negligence.—See *infra*, "Res Ipsa Loquitur."

Presumptions and Burden of Proof.—See *infra*, "Res Ipsa Loquitur."

Questions of Law and Fact.—*Negligence of Carrier's Servant.*—In the instant case the trial court properly referred to the jury the question of whether or not the baggage master was negligent in assisting plaintiff's husband and friends in lowering her from the baggage car. Walters *v.* Norfolk & W. Ry. Co., 149.

Res Ipsa Loquitur.—The doctrine of *res ipsa loquitur* applies when an accident happens to a passenger who is himself without fault and is caused by a defect in any of those things which the carrier is bound to supply, or is the result of the failure in any respect of the carrier's means of transporta-

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CARRIERS OF PASSENGERS—Continued.

Res Ipsa Loquitur—Continued.

tion, or the conduct of its servants in connection therewith. Under such circumstances a presumption of negligence arises against the carrier for injuries thus caused. Walters *v.* Norfolk & W. Ry. Co., 149.

If an injury happens to a passenger in consequence of the breaking of the vehicle, a defect in the roadway or track, or any of the other appliances owned or controlled by the carrier in making the transit, a *prima facie* case is made for the recovery of damages, and then the carrier must show the absence of any negligence by itself or its servants causing the accident, and that the utmost diligence and observance of duty on its part could not have prevented the injury. In the absence of proof on the part of the carrier to rebut this presumption of negligence, the presumption becomes conclusive. Walters *v.* Norfolk & W. Ry. Co., 149.

Where the cause of the injury is plainly outside of the control of the carrier, and has no connection with the machinery and appliances of transportation or the negligence of its servants, in operating such instruments of transportation, such accident raises no presumption of negligence on the part of the carrier, and the burden of showing such negligence is upon the party who avers it. Walters *v.* Norfolk & W. Ry. Co., 149.

Plaintiff, an invalid, was injured by a fall while being removed in an invalid's chair from defendant carrier's baggage car by her husband and two friends, assisted by the baggage master. The invalid's chair was no part of the equipment of the company. It was entirely under the control of the plaintiff and her friends. Her safety might well have been safeguarded if they had placed a strap or support in front of her fastened to the arms of the chair. That the accident would not have happened if her husband and his friends had not been negligent in lowering the chair was fairly manifest. Held: That the doctrine of *res ipsa loquitur* had no application. Walters *v.* Norfolk & W. Ry. Co., 149.

Who Are Passengers.—See *infra*, "Postal Clerk."

CAVEAT EMPTOR. See JUDICIAL SALES.

Mortgages and Deeds of Trust.—The rule of *caveat emptor* applies with full force to sales made under deeds of trust to secure creditors. The deed is the chart by which the trustee is to be governed. He is a special agent with designated powers, and a purchaser at a sale made by him takes upon himself the risk not only of the fairness of the sale, but of

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CAVEAT EMPTOR—Continued.

Mortgages and Deeds of Trust—Continued.

the regularity thereof, and of his compliance with all the substantial requirements of the instrument under which he acts. Such purchaser is chargeable with notice of the extent and limitation of the trustee's powers. He is bound not only by *actual* notice, but by *constructive* notice as well, which is the same in effect as actual notice. If he has notice, actual or constructive, that the trustee is exceeding his authority in making the sale, or is not complying substantially with the terms of the instrument creating the power of sale, he does not occupy the position of a purchaser without notice. Smith *v.* Woodward, 356.

CHANGE OF VENUE. See VENUE.

CHARITIES.

Benevolent Object of a Public Character.—See *infra*, "Hospitals."

County as Donee.—The General Assembly of Virginia passed an act (Acts 1912, p. 111), providing that the county of Rockingham should be capable, through its board of supervisors, "to accept any donation or any trust made for benevolent or charitable objects of a public nature, not religious or sectarian, within its external territorial limits, and to perform such conditions and execute such trusts as may be imposed upon it by the terms of the instrument by which the donation is made or the trust is created." Subsequent to this act a testator by his will directed that his estate should be converted into money and gave the proceeds to the county of Rockingham on condition that said county should forever pay interest, at the rate of four per cent. per annum, on the amount received by it, to the Rockingham Memorial Hospital, the hospital to apply the interest or income to the support or maintenance in its hospital of indigent patients from the county of Rockingham and the town of Harrisonburg. Held: That though this bequest might not be technically a trust, it was a donation to the county, upon condition, while the interest thereon when paid by the county to the hospital constituted a trust fund of which the Rockingham Memorial Hospital was the trustee. The general purpose of the act is the aid of benevolent and charitable objects of a public character within the territorial limits of the county of Rockingham, and the county is enabled by the act to effectuate this object, either by the acceptance of donations or the execution of trusts committed to it. Pirkey *v.* Grubb's Ex'or, 91.

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CHARITIES—Continued.

County as Donee—Continued.

In the instant case, therefore, there was a valid enabling act, the provisions of which have been carefully observed by the testator in his commendable efforts to provide a beneficent public charity, coupled with an acceptance of the gift upon the condition attached by the donor thereto, which condition is altogether reasonable in itself and the result of its acceptance is that the taxpayers of the county of Rockingham and town of Harrisonburg are, to the extent which the fund will provide, relieved of a burden which would otherwise rest upon them. Pirkey *v.* Grubb's Ex'or, 91.

The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has supreme legislative power except so far as it is restrained by the State or Federal Constitution. Pirkey *v.* Grubb's Ex'or, 91.

Hospitals.—The establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a benevolent object of a public character; this is manifest from sections 1719 and 1720 of the Code of 1904, authorizing such hospitals and their maintenance out of the public funds; and the maintenance of the indigent poor is also a benevolent or charitable object of a public character. Pirkey *v.* Grubb's Ex'or, 91

Municipal Corporations.—See *infra*, "County as Donee."

CHILDREN. See CRUELTY TO CHILDREN.

CHILDREN'S HOME SOCIETY. See REFORMATORIES.

CHOSE IN ACTION. See GIFTS.

CIRCUMSTANTIAL EVIDENCE.

Corpus Delicti.—Direct evidence is not essential to prove the *corpus delicti* in any case. It may be proved as any other fact may be proved which is essential to establish the guilt of the accused, namely, by circumstantial evidence which produces "the full assurance of moral certainty" on the subject. Cochran *v.* Commonwealth, 801.

Fires.—See FIRES.

Inference from a Presumption.—All facts which are proved in a case in the same manner as if they were the very facts in issue—that is, by evidence of logical probative value, either 123.

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CIRCUMSTANTIAL EVIDENCE—Continued.

Inference from a Presumption—Continued.

direct (testimonial) or circumstantial, may serve as a basis from which further inference may be drawn. Since all facts in issue may be proved by circumstantial evidence, as well as by direct or testimonial evidence, and every fact proved by circumstantial evidence is but an inference from such evidence, where a fact is proved in a case as a fact, although by inference from circumstantial evidence, such fact may itself be taken as a basis for a new inference of fact. Ches. & O. R. Co. *v.* Ware, 246.

Notwithstanding that there was no direct evidence before the jury that a train had in fact passed the point of origin of the fire at or about the time of the fire in question, where such fact was established by circumstantial evidence, the jury may infer from the fact of the passage of the train at that time, in connection with other facts, that the fire was set out by the train as it passed the point of origin of the fire. Ches. & O. R. Co. *v.* Ware, 246.

The fundamental error in the instruction set out in the preceding headnote is that an ordinary reader or juror would be apt to construe it to mean that a jury cannot draw an inference of fact from circumstantial evidence; that such an inference is a presumption based upon a presumption, which cannot serve as an intermediate fact from which (along with other circumstantial evidence) the jury may draw another inference of fact. The error of this position is pointed out by the Supreme Court of Appeals in the case of C. & O. Ry. Co. *v.* Ware, *ante*, page, 246, 95 S. E. 183. Torbert *v.* Atlantic Coast Line R. Co., 682.

The inference that the mosquitoes which caused the malaria complained of were bred in the bed of the old canal was not proved as a fact in the case, and in the very nature of the subject under the circumstances of the instant case could not by any possibility have been so proved. In such case, the rule that "an inference cannot be drawn from a presumption, but must be founded upon some fact legally established," applies. See Chesapeake and Ohio Railway Company *v.* Ware, *post*, 246, 95 S.E . 183. Ches. & O. R. Co. *v.* Catlett, 232.

In an action for damages by fire, the court instructed the jury "that in order to warrant a verdict against the defendant, the evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established." Held: That, the instruction was not erroneous,

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CIRCUMSTANTIAL EVIDENCE—Continued.

Inference from a Presumption—Continued.

while the statement in the instruction, that an inference cannot be drawn from a presumption, but must be founded upon some fact legally established, could not have been very helpful to the jury, yet in view of other instructions given in the case it could not have led them astray. Abernathy *v.* Emporia Mfg. Co., 406.

Presumption Based upon Presumption.—See *infra*, "Inference from a Presumption."

COLLATERAL ATTACK. See DIVORCE.

COMMERCIAL TRAVELERS OR DRUMMERS.

Authority.—There is inherent difficulty in proving the scope of a traveling salesman's authority where it depends upon parol testimony, especially where the principal is a corporation and a non-resident. In the case at bar the question at issue was whether an agent of defendant had authority to make a sale, or whether his authority was limited to taking an order subject to acceptance and confirmation by defendant. There was direct testimony tending materially to show that the authority of defendant's agent carried with it the authority to make sales, and that he was not merely a drummer, or commercial traveler, in the narrow sense of that term, with authority only to take orders subject to acceptance and confirmation by his principal, and therefore, the court properly allowed the question of the agent's authority to make the sale in question to go to the jury. Lysle Milling Co. *v.* Holt & Co., 565.

COMMISSION. See CORPORATIONS.

COMMISSION MERCHANTS. See FACTORS AND COMMISSION MERCHANTS.

COMMISSIONER IN CHANCERY. See MASTER IN CHANCERY.

COMMISSIONERS. See EMINENT DOMAIN.

COMMISSIONER'S REPORT. See APPEAL AND ERROR.

CONCLUSIONS OF LAW. See INDICTMENT AND INFORMATION.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN.

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CONFESSIONS.

Cruelty to Children.—Upon the trial of defendant for cruelty to a boy under his control, a witness for the Commonwealth testified to statements made by the boy to him, which he had repeated to defendant, who had either given satisfactory explanations of them or denied them. Held: That such testimony was purely hearsay and did not amount to a confession by defendant. Flippo *v.* Commonwealth, 854.

Intoxicating Liquors.—Affidavits of accused, when receipting for liquor from an express company, were admissible in evidence under the rules applicable to the admissibility of documentary evidence, as confessions of the accused. Cochran *v.* Commonwealth, 801.

CONFLICTING EVIDENCE. See APPEAL AND ERROR.

CONFLICT OF LAWS.

Wills.—The law of a testator's domicile applies in construing his will as to personality, but where a farm in Virginia is disposed of by a will, the will as to that farm must be construed with reference to the law of Virginia since the tax *situs* governs. Smith *v.* Smith, 341.

CONNECTING CARRIERS.

Carriers of Live Stock.— See *infra*, "Liability of Initial Carrier under Interstate Commerce Law."

Implied Contracts.— See *infra*, "Liability of Initial Carrier under Interstate Commerce Law."

Liability of Initial Carrier under Interstate Commerce Law.— *Another Contract Made with a Connecting Carrier.*—Under the interstate commerce act and its amendments, if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier, en route of the shipment, beyond the terminal of the initial carrier, issues another contract of carriage to the shipper for a remaining portion of the original route and takes up the original bill of lading evidencing the original contract upon its surrender by the shipper, the second contract of carriage does not supersede the first, and in such case the first contract remains in force by virtue of said Federal statute law and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract), have no right of action for damages against such subsequent carrier, but only against the initial carrier. In such case there can be, in con-

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CONNECTING CARRIERS—Continued.

Liability of Initial Carrier under Interstate Commerce Law—Continued.

templation of law, but one initial carrier and no action by the shipper or one claiming under him can be maintained, against any subsequent carrier en route, although instituted upon a subsequent contract of carriage with the latter, such as that aforesaid. Ches. & O. R. Co. *v.* National Bk., 471.

Carriers of Live Stock.—The initial carrier of live stock, notwithstanding the interstate commerce act and its amendments, is only liable for some default in its common law duty as a carrier or for some default in the like duty of some of its connecting carriers. Ches. & O. R. Co. *v.* National Bk., 471.

General Rule.—Congress by the Carmack amendment (34 St. L. 594) has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout. In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one State to a place in another State, beyond your own terminal, you must do so under a contract to transport to the place designated." Ches. & O. R. Co. *v.* National Bk., 471.

Implied Contracts.—And the same would be true if the initial contract of carriage were not an express contract, but one implied in law because of the duty imposed by the Federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line. Ches. & O. R. Co. *v.* National Bk., 471.

If no express contract had been made with a carrier of live stock and the stock had been received by it for transportation, that state of facts would have constituted it the initial carrier for the entire route under the interstate commerce law as amended, and that carrier could alone have been sued for injury to the live stock en route, notwithstanding any subsequent contract of carriage between the consignee and an intermediate connecting carrier. But in the case at bar such were not the facts, for the live stock had been shipped under a shipper's order contract. Ches. & O. R. Co. *v.* National Bk., 471.

Inanimate Goods.—At common law, upon the proof merely of delivery to a common carrier of inanimate goods for transportation and the proof of their non-delivery, the law implies that they have been lost by the negligence of the com-

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CONNECTING CARRIERS—Continued.

Liability of Initial Carrier under Interstate Law.—Continued.

Inanimate Goods—Continued.

mon carrier or by reason of some cause for which it is responsible, and the plaintiff suing for damages occasioned by such loss is relieved of the burden of proof of the cause of the loss. And this rule applies to the initial carrier of inanimate goods under the interstate commerce act and its amendments. Ches. & O. R. Co., *v.* National Bk., 471.

Tariff Regulation.—Where owing to a lawful tariff regulation filed with the Interstate Commerce Commission according to law, the shipment of live stock from points west of Chicago to points east of that place on shipper's order contract, *i. e.*, on an "order notify" bill of lading, was invalid, the shipper or the consignee might make a second contract of carriage from Chicago to the place of destination of the live stock. Such second contract of carriage is not forbidden by the Interstate Commerce Law and its amendments, and the carrier with whom it is made becomes the initial carrier and is the proper defendant in an action for injury and damage whether caused by its own line or some connecting carrier en route from Chicago to the place of destination of the live stock. Ches. & O. R. Co. *v.* National Bk., 471.

Unenforceable Contract with Initial Carrier.—The doctrine set forth in the two preceding headnotes, however, is based upon the fundamental consideration that in such case the initial contract of carriage was one which was enforceable by the plaintiff under the Federal statute, as covering the entire route of the original shipment; that any subsequent contract of carriage with any intermediate carrier was needless, was not required in such case by the Federal statute and was against its policy. Ches. & O. R. Co. *v.* National Bk., 471.

Validity of Tariff Regulation.—A tariff regulation filed with the Interstate Commerce Commission according to law, forbade the movement of live stock on shipper's order contract, that is to say, on an "order notify" bill of lading east of Chicago, the regulation applying to all carriage of live stock freight on the lines of all common carriers east of Chicago on "order notify" bills of lading. It was contended that this tariff regulation was unlawful as to shipments of live stock from points west of Chicago originally destined to points east of that place on "order notify" bills of lading, because such tariff regulation incidentally breaks, interrupts and stops such an originally intended through and continuous interstate carriage of freight. Held: That as the interstate commerce law permits such a break, stoppage or interruption

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CONNECTING CARRIERS—Continued.

Liability of Initial Carrier under Interstate Law—Continued.

Validity of Tariff Regulation—Continued.

as may be made in good faith for a necessary purpose and without intent to avoid or unnecessarily interrupt such continuous carriage or to evade the provisions of the interstate commerce act, the tariff regulation was not forbidden by the Federal law. Ches. & O. R. Co. *v.* National Bk., 471.

Tariff Regulation.—See *infra*, "Liability of Initial Carrier under Interstate Commerce Law."

CONSIGNOR AND CONSIGNEE. See FACTORS AND COMMISSION MERCHANTS.

CONSTITUTIONAL LAW. See EMINENT DOMAIN.

Counties.—The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has supreme legislative power except so far as it is restrained by the State or Federal Constitution. Pirkey *v.* Grubb's Exor, 91.

Documentary Evidence.—The constitutional right of a defendant in a criminal prosecution to be confronted with his accusers and witnesses does not exclude proper documentary evidence. Documentary evidence is admissible in criminal as in civil cases, under the same rules which define and limit its admissibility. Cochran *v.* Commonwealth, 801.

Due Process of Law.—See TAXATION.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Municipal Corporations.—See MUNICIPAL CORPORATIONS.

Power of Legislature.—The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has supreme legislative power except so far as it is restrained by the State or Federal Constitution. Pirkey *v.* Grubb's Ex'or, 91.

Public Service Corporations.—See EMINENT DOMAIN.

Searches and Seizures.—See SEARCHES AND SEIZURES.

Statutes.—See STATUTES.

Taking Private Property without Compensation.—See EMINENT DOMAIN.

Taxation.—See MUNICIPAL CORPORATIONS; TAXATION.

Title of Statutes.—See STATUTES.

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CONSTRUCTION. See INTERPRETATION AND CONSTRUCTION.

CONTINUANCE.

Filing Affidavits.—See AFFIDAVITS.

Time of Filing.—*Pleading.* See PLEADING.

CONTRACTS.

Advancements.—See ADVANCEMENTS.

Fraud and Deceit.—See FRAUD AND DECEIT.

Implied Contracts.—See CONNECTING CARRIERS.

Municipal Corporations.—See MUNICIPAL CORPORATIONS.

Mutuality.—See SALES.

Parties to Action.—The general rule at common law was that, whether the contract was express or implied, by parol or under seal, or of record, the action must be brought in the name of the party in whom the legal interest was vested, and that this legal interest was vested in the person to whom the promise was made, and consequently that he or his privy was the only person who could sue in a court of law upon such contract. Thacker *v.* Hubard, 379.

Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach. Where the right of the creditor is derivative only, his remedy is in equity and not at law. Thacker *v.* Hubard, 379.

But some exceptions to this general rule were recognized at an early day, and others have been made since. Thus, in contracts *not under seal*, it has been held, for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B $1,000, B may in his own name maintain an action against A. But where the promise is *under the seal of the promisor*, the common law never relaxed its requirement that the action should be brought by the promisee, alone, or his personal representative, and not by any one *for whose benefit*, ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes*. Thacker *v.* Hubard, 379.

Sale of Land.—See SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Sales.—See SALES.

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CONTRACTS—Continued.

Specialty or Simple Contract.—A grantee of a deed assumed the payment of notes which the grantor had given and secured by a deed of trust upon the property conveyed as a part of the consideration for the conveyance. The deed contained an express agreement that the grantee would assume the payment of the said notes, but though the deed was accepted by the grantee it was not signed by him. Held: That as the grantee did not sign the deed in which the payment of the notes was expressly assumed, but simply accepted it, his contract to pay was not a specialty, but a simple contract debt. Thacker *v.* Hubard, 379.

Specific Performance.—See SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVEYANCES. See DEEDS; FRAUDULENT AND VOLUNTARY CONVEYANCES.

CORPORATION COMMISSION. See CORPORATIONS.

CORPORATION COURT. See MORTGAGES AND DEEDS OF TRUST; MUNICIPAL CORPORATIONS.

CORPORATIONS.

Commission.—See *infra*, "Corporation Commission."

Corporation Commission.—*Interstate Commerce.*—Under the above state of facts, the railroad interposed the defense that the Commission had no jurisdiction because the shipments proposed by the petitioner were interstate commerce. As, however, it appeared that the spur track facility was used indiscriminately by the company both for interstate and intrastate commerce and the restoration of the track, instead of constituting a burden upon interstate commerce, would be in aid of interstate commerce, and enable the company to do both classes of business more efficiently, the State Corporation Commission had jurisdiction over the complaint. If this defense be valid, then the Commission is without jurisdiction to deal with any railway facility located in this State, because practically all railway facilities are used both for interstate and intrastate commerce, just as this industrial spur track is to be used. Washington, Etc., Ry. *v.* Royster G. Co., 397.

The rights of shippers and the duties of the public cannot be determined by the consideration that the revenues derived

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CORPORATIONS—Continued.

Corporation Commission—Continued.

by the railroad on shipments of interstate commerce were less than those on shipments of intrastate commerce. To admit such a proposition is to admit that the railroad has the right to discriminate against interstate commerce. Therefore, it was no defense in the instant case, that the railroad's freight revenue derived from petitioner's proposed shipments from a point without the State, would be less than if the shipments were transported over its own line from a point within the State. Washington, Etc., Ry. *v.* Royster G. Co., 397.

Pleading.—A petition was filed before the State Corporation Commission to compel the extension by the defendant railroad of an industrial spur track, which was originally constructed upon its right of way, but the extreme end of which, built on a wooden trestle, had been destroyed by fire and never rebuilt. It appeared from the evidence that the general public would be interested in the spur track, and that the track when constructed would not constitute merely a private switching facility for the sole benefit of the petitioner. The railroad had distinctly declined the offer made by the petitioner to bear the expense, and had refused to build the track upon any terms whatever. The prayer of the petition was that the railroad be required to extend and operate the siding, or that the petitioner be allowed to construct it and the railroad required to operate it. Held: That the order of the Commission requiring the work to be done entirely at the expense of the railroad, did not go outside of the issue as made up between the parties, even if it is conceded that the Commission, in proceedings of this character, can be held to strict rules of pleading as to the scope of the orders made by it. Washington, Etc., Ry. *v.* Royster G. Co., 397.

Private Benefit.—The petitioner constitutes a part of the public, and is entitled to facilities equal to those of his competitors in business, and the defendant company has no right to discriminate against its business by refusing to maintain the facility so long as it is needed to enable the defendant properly to discharge its public duties. The land was acquired by the railroad for the very purpose of maintaining this industrial spur track, and the evidence plainly indicated that it was necessary at the time it was constructed, and none the less necessary at this time. In refusing to rebuild and maintain this track in its entirety, the company plainly failed to discharge its duties. Washington, Etc., Ry. *v.* Royster G. Co., 397.

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CORPORATIONS—Continued.

Corporation Commission—Continued.

Review of Decisions.—The State Corporation Commission had prescribed no rate on creosote oil in steel drums. The Commission had, however, provided that "articles not enumerated will be classified with analogous articles." In an action of assumpsit to recover excess freight charges on creosote shipped from Richmond to Norfolk, the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged. Held: That the judgment did not in any way call in question any action of the State Corporation Commission and accordingly was not in contravention of section 156 of the Constitution. If it be conceded that the court plainly erred in its classification, it was an error of judgment in the determination of the rights of the parties, which cannot be reviewed by the Supreme Court of Appeals when the amount in controversy is less than $300. Ches. & O. R. Co. *v.* Williams, 502.

Interstate Commerce.—See *infra*, "Corporation Commission."

Place of Business of Corporation.—In the certificate of incorporation of the defendant company, the place wherein its principal office was to be located was designated as "Hopewell, Prince George county, Virginia." Afterwards the community known as Hopewell was severed from the county and incorporated as the city of Hopewell. Held: That, the severing of the territory from the county of Prince George, just as it changed the citizenship of every natural person then domiciled within the area thus severed, so it also changed the location of the principal offices of all corporations which were located within that area. And if defendant corporation's principal office was located in the territory incorporated as the city of Hopewell, the corporation court of that city had jurisdiction of an action against it. Builders Supply Co. *v.* Piedmont L. Co., 225.

Pleading.—See *infra*, "Corporation Commission."

Public Service Corporations.—A public service corporation may act in a private capacity, as distinguished from its public capacity. Killam *v.* Norfolk & W. R. Co., 541.

Service of Process.—See SERVICE OF PROCESS.

State Corporation Commission.—See *infra*, "Corporation Commission."

Stock and Stockholders.—A corporation is a separate entity from its stockholders. Norfolk So. R. Co. *v.* Greenwich Corp., 631.

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CORPUS DELICTI.

Circumstantial Evidence.—Direct evidence is not essential to prove the *corpus delicti* in any case. It may be proved as any other fact may be proved which is essential to establish the guilt of the accused, namely, by circumstantial evidence which produces "the full assurance of moral certainty" on the subject. Cochran *v.* Commonwealth, 801.

Declaration and Admissions.—Independent of statute, the admissions of the accused "are competent evidence tending to prove the *corpus delicti.*" Cochran *v.* Commonwealth, 801.

Express Records.—There is no merit in a contention that, in a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the record of the express company and affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved. Cochran *v.* Commonwealth, 801.

Intoxicating Liquors.—The *corpus delicti* in a prosecution for violation of section 40 of the prohibition act (Acts 1916, page 215), was the fact that some one person received delivery of whiskey in excess of one quart in quantity within a period of one calendar month as charged in the indictment; and the express record alone, showing the receipts by the accused of two quarts of liquor within the calendar month, was *prima facie* evidence of that fact, and in the absence of rebutting evidence such *prima facie* evidence became conclusive. Cochran *v.* Commonwealth, 801.

COSTS.

Creditors' Suits.—In a creditor's suit to subject to the lien of judgments certain parcels of real estate, a bank, by its counsel, offered proof of a judgment against the judgment debtor, to which counsel for certain other judgment creditors objected, because the bank had refused to contribute anything to the cost of the suit. The master reported the judgment, however, and the other judgment creditors excepted to the master's report on the same ground, and the trial court overruled the exception. Held: That there was no error in the ruling. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

The bank offered the proof by counsel of its own selection and could not be required to contribute to the compensation of counsel of appellants. The only other costs to which it could be required to contribute were the legal and taxable costs of the suit. If no property was disclosed in the suit, it was subject to a decree against it for its due proportion of such costs, but as the record discloses abundant prop-

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COSTS—Continued

Creditors' Suits—Continued.

erty out of which the costs could be made, the question becomes one of no practical importance. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Disclaimer.—See *infra*, "Prevailing Party."

Executors and Administrators.—Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate, his costs are taxed against the estate. Bowen's Ex'or. v. Bowen, 1.

Prevailing Party.—At the second trial the defendant entered a disclaimer as to about one acre of the land in controversy. Plaintiff refused to accept the disclaimer in satisfaction of his demand, and it was manifest that the land disclaimed was but a small part of the subject of litigation. Held: That plaintiff was not entitled to recover costs up to the time of the disclaimer, where the verdict and judgment in a third trial was for defendant, as the case is controlled by section 3545 of the Code of 1904, providing that the party for whom final judgment is given shall recover his costs. McClung *v.* Folkes, 48.

Wills.—Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate, his costs are taxed against the estate. Bowen's Ex'or *v.* Bowen, 1.

Where in the contest of a will it appeared that the beneficiary was the active litigant, seeking probate of the will, the contest being one between him as a beneficiary on the one hand, and the heirs at law of the decedent on the other, if the heirs at law prevail they may properly be awarded their costs against their adversary. Bowen's Ex'or *v.* Bowen, 1.

COUNTERCLAIM. See SET-OFF, RECOUPMENT AND COUNTERCLAIM.

COUNTIES.

Annexation.—See *infra*, "Recovery of Money Belonging to County Retained by Treasurer;" "Treasurer."

Board of Supervisors.—A board of supervisors may incur an obligation for a proper public purpose, when so authorized by the General Assembly, which will bind its successors indefinitely. Pirkey *v.* Grubb's Ex'or, 91.

Charities.—*County as Donee.* See CHARITIES.

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COUNTIES—Continued.

Constitutional Law.—The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has supreme legislative power except so far as it is restrained by the State or Federal Constitution. Pirkey *v.* Grubbs's Ex'or, 91.

Recovery of Money Belonging to County Retained by Treasurer.—*Construction of Secs.* 862 *and* 865, *Code of* 1904.—Secs. 862 and 865, Code of 1904, are contained in chapter 37 of the Code which deals with the duties of county and city treasurers, and prescribes remedies against them and their bondsmen for the breach of such duties. The two sections bear reciprocal relations to each other, and to some extent are interdependent. In these circumstances they must be considered together to maintain congruity of construction and to make the provisions of both effectual. For it is a general rule of construction of statutes, that, as far as practicable, whatever is necessary to give them efficiency should be supplied. Hechler's Ex'x *v.* Kemp, 528.

Construction of Section 865, *Code of* 1904.—The language of section 865 is too plain to call for construction. It declares, in such cases, that the motion shall be brought "at the relation of his successor, for the use of * * * the county, district, county school board, or district school board, as the case may be * * *." The fund in dispute being moneys required by section 862 to be paid by the retiring treasurer to his successor in office, it is recoverable on motion brought in the name of the successor in office of the retiring treasurer, suing at the relation of and for the use of all the district school boards interested in the controversy, against the former treasurer and the surety on his official bond. Hechler's Ex'x *v.* Kemp, 528.

The statute is remedial and even if doubtful should be liberally construed in furtherance of the remedy. But it is too plain to render the application of this rule of construction necessary. Hechler's Ex'x *v.* Kemp, 528.

School Districts.—Upon the annexation of part of the territory of Henrico county by the city of Richmond, of the sum decreed to be paid by the city to the county in compensation for the land and property taken, $133,158.63 was the ascertained value of certain property held by several of the district school boards of the county. The entire amount due by the city for all territory and property taken over was decreed to be paid to the county, and was received by the county treasurer. By resolution of the board of supervisors the treasurer was directed to place to the credit of each of the

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COUNTIES—Continued.

Recovery of Money Belonging to County Retained by Treasurer—Continued.

School Districts—Continued.

district school boards its proportionate part of the fund received by the county from the city on account of the school property taken. This entire fund decreed to be paid to the county of Henrico was in terms included in section 862, Code of 1904, by the designation of "all money belonging to the county," and was recoverable on motion under section 865, Code of 1904. The apportionment among the several district school boards of that part of the fund which represented the purchase price of county school property was proper and within the authority of the board of supervisors to direct. In the absence of such apportionment, unquestionably the failure of the treasurer to pay over this money to his successor in office would have been a breach of official duty for which he and his surety would have been liable, and the fund would have been recoverable for the use of the county by motion in the mode prescribed by section 865, Code of 1904. And it is equally clear that after apportionment, it was so recoverable for the use of the several district school boards. Hechler's Ex'x *v.* Kemp, 528.

Supervisors Binding Their Successors.—See *infra*, "Board of Supervisors."

Treasurer.—See *infra*, "Recovery of Money Belonging to County Retained by Treasurer."

Compensation.—Code of 1904, section 1449, as amended by Acts 1908, chapter 309, provides that the county treasurer unless otherwise specially provided, shall receive such compensation as the county school board may determine for handling school funds provided, that the same shall not be more than one per centum upon the amount received. Held: That this provision governed the compensation a county treasurer was entitled to, where the treasurer was directed by resolution of the board of supervisors to place to the credit of each of the district school boards its proportionate part of a fund received by the county from the city on account of the school property taken by the city in annexation proceedings, and fixing the compensation of the treasurer at one-fourth of one per cent. Hechler's Ex'x *v.* Kemp, 528.

COURTS.

Corporation Commission.—See CORPORATIONS.

Corporation Court.—See MORTGAGES AND DEEDS OF TRUST.

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COURTS—Continued.

Eminent Domain.—*Instructing Commissioners.*—See EMINENT DOMAIN.

Jurisdiction.—See JURISDICTION.

CREDITORS' SUITS.

Adverse Possession against Debtor.—See ADVERSE POSSESSION.

Costs.—In a creditor's suit to subject to the lien of judgments certain parcels of real estate, a bank, by its counsel, offered proof of a judgment against the judgment debtor, to which counsel for certain other judgment creditors objected, because the bank had refused to contribute anything to the cost of the suit. The master reported the judgment, however, and the other judgment creditors excepted to the master's report on the same ground, and the trial court overruled the exception. Held: That there was no error in the ruling. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

The bank offered the proof by counsel of its own selection and could not be required to contribute to the compensation of counsel of appellants. The only other costs to which it could be required to contribute were the legal and taxable costs of the suit. If no property was disclosed in the suit, it was subject to a decree against it for its due proportion of such costs, but as the record discloses abundant property out of which the costs could be made, the question becomes one of no practical importance. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Lien of Judgments.—See ADVERSE POSSESSION.

Parties.—Assuming, but not deciding, that one who has secured title to property through adverse possession is a proper party in a creditor's suit to enforce the lien of judgments against a former owner of the property, and that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations (section 2915, Code of 1904) must be held to protect the adverse claimant if he shows sufficient facts as to the character and duration of his possession. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Receivers.—See RECEIVERS.

CRIMINAL LAW. See REFORMATORIES.

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CRIMINAL LAW—Continued.

Appeal and Error.—*Verdict Contrary to the Evidence.*—Where neither the evidence introduced on the trial nor the facts proved are before the Supreme Court of Appeals, either by bill of exceptions or other certification, an objection that the verdict is contrary to the evidence cannot be considered by that court. Wilkerson *v.* Commonwealth, 920.

Arraignment and Plea.—Virginia Code, 1904, section 4012, provides: "In prosecutions for misdemeanors, in cases not embraced by section 4010, after a summons has been executed ten days before the first day of the term of court, or if the accused was admitted to bail and made default, the court may either award a *capias* or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty." If the accused is absent, no arraignment can be made because of his absence, but nevertheless the court may proceed to trial just as if he had appeared and pleaded not guilty. If he is present when his case is called, he should plead, if he desires to make defense, and if he goes to trial without pleading, he thereby waives his right to do so. While arraignment is necessary in felony cases, it is not necessary in misdemeanors. Bare *v.* Commonwealth, 783.

Assault and Battery.—See ASSAULT AND BATTERY.

Bill of Particulars.—See BILL OF PARTICULARS.

Corpus Delicti.—See CORPUS DELICTI.

Cruelty to Children.—See CRUELTY TO CHILDREN.

Documentary Evidence.—The constitutional right of a defendant in a criminal prosecution to be confronted with his accusers and witnesses does not exclude proper documentary evidence. Documentary evidence is admissible in criminal as in civil cases, under the same rules which define and limit its admissibility. Cochran *v.* Commonwealth, 801.

Dying Declarations.—See DYING DECLARATIONS.

Election.—See INDICTMENT AND INFORMATION.

Evidence.—See EVIDENCE.

Grand Jury.—See *infra*, "Infants."

Harmless Error.—Where both prisoners were convicted by the jury under instructions which permitted them to find the prisoners guilty of a higher offense, and one carrying a higher maximum and minimum punishment, than that with which they were charged, the error cannot be said to be harmless, where the jury did not impose the minimum penalty prescribed by the statute for the offense with which they were charged. Hummer *v.* Commonwealth, 826.

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CRIMINAL LAW—Continued.

Homicide.—See HOMICIDE.

Indictment and Information.— See INDICTMENT AND INFORMATION.

Infants.—Section 2, chapter 350, Acts 1914, page 696, provides that: "No court or justice, unless the offense is aggravated, or the ends of justice demand otherwise, shall sentence or commit a child under eighteen years of age charged with or proven to have been guilty of any crime to a jail, work-house or police station, or send such a child on to the grand jury, nor sentence such child to the penitentiary," etc. As chapter 350 of Acts 1914 invests justices of the peace as well as courts of record with jurisdiction of cases arising under that act, the judgment of a justice of the peace in sending the accused, a minor sixteen or seventeen years of age, on to the grand jury was equivalent to the judicial ascertainment of the fact that the grave offense wherewith he was charged was aggravated, or that the ends of justice demanded its investigation by the grand jury. Therefore, while the judgment remained in force, the circuit court was under obligation to respect it, and it afforded sufficient ground for putting the accused upon trial. Green *v.* Commonwealth, 862.

Instructions.—See INSTRUCTIONS.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Joinder of Offenses.—See INDICTMENT AND INFORMATION.

Larceny.—See LARCENY.

Licenses.—See LICENSES.

Minors.—See *infra*, "Infants."

New Trial.—See NEW TRIAL.

Plea.—See *infra*, "Arraignment and Plea."

Reasonable Doubt.—See REASONABLE DOUBT.

Res Gestae.—See RES GESTAE.

Searches and Seizures.—See SEARCHES AND SEIZURES.

Striking Out Evidence.—See EVIDENCE.

Sundays and Holidays.—See SUNDAYS AND HOLIDAYS.

Witnesses.—See WITNESSES.

CROSSINGS.

Contributory Negligence.—See LAST CLEAR CHANCE, and see *infra*, "Last Clear Chance."

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CROSSINGS—Continued.

Contributory Negligence—Continued.

Plaintiff driving a two-horse delivery wagon along a street which intersected a street upon which defendant's street railway ran, approached the crossing of defendant's street railway driving at a slow rate of speed. When he reached the street upon which the railway was, plaintiff looked east, and discovering no car on the westbound track (the one nearest to him), he then looked west and saw a car on the eastbound track half a block away, coming toward the crossing. Although he knew that the car was dangerously near and was approaching rapidly, he paid no further attention to it, but continued to drive across the street upon which the street railway was, without accelerating his speed, and, without even looking in the direction of the car, drove on the track in front of it. Immediately before the collision, plaintiff hearing the noise of the car turned his head and looked, and the car he testified, was "right on top" of him. Held: That if the defendant was guilty of negligence, plaintiff's own negligence, which continued down to the moment of the collision, if not the proximate cause of the accident, at least efficiently and concurrently contributed thereto. Virginia Ry. & P. Co. *v.* Harris, 657.

It was plainly the duty of the plaintiff, when he discovered the approaching car, to keep a lookout on its movement, and to so regulate his own conduct as to avoid danger of collision. In the circumstances detailed, the dictate of common prudence demanded such precaution; and if plaintiff chose to disregard it, he was the author of his own misfortune and his contributory negligence defeats his right to recover for the consequent injury. Virginia Ry. & P. Co. *v.* Harris, 657.

Where a woman of intelligence and activity, aware of the danger of the situation, and with nothing to distract her attention or hinder her prevision, walked upon a street railway track, not at a regular crossing, but at a point twenty-seven feet beyond the crossing, without taking adequate precautions for her safety, there can be no recovery as a matter of law. Va. Ry. & P. Co. *v.* Boltz, 649.

Presumptions and Burden of Proof.—In an action for personal injuries sustained at a grade crossing, the court instructed the jury that the burden of proving contributory negligence was upon the defendant. This was erroneous, as the instruction should have concluded, "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances," or with language of similar import. Norfolk So. R. Co. *v.* Smith, 302.

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CROSSINGS—Continued.

Last Clear Chance.—Plaintiff's intestate was killed by being struck by a car of defendant, an electric interurban railway, which he had intended to board. Defendant's station was on the west side of the tracks and in order to reach it it was necessary for plaintiff's intestate to cross over the tracks. When a short distance from the tracks plaintiff's intestate and his brother, who was accompanying him, heard and saw the car approaching at a distance of 150 to 200 yards from the station. The car was running at a rate of from twenty to twenty-five miles per hour and carried a dim light. Seeing the car approaching, they quickened their speed, and as they approached saw several persons on the station platform signaling the car to stop. The car was scheduled to stop on signal and had uniformly theretofore done so, but on this occasion it neither slackened its speed nor stopped, and in continuing its course struck the intestate, who was attempting to cross the track, inflicting the injury of which he subsequently died. The car was in full view from the time it was first observed at a distance of 150 to 200 yards until the intestate was struck, and the evidence showed that the intestate was looking at the approaching car. Held: That the contributory negligence of plaintiff's intestate barred a recovery for his death; and that the doctrine of last clear chance was not applicable. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

The intestate was laboring under no physical disability. The car was in full view, and he was "looking at the car approaching." The motorman had the right to assume that he would not step in front of it. It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it. The fact that he was a passenger gave him no right to step upon the track in close proximity to the rapidly approaching car. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

In an action for personal injuries sustained at a grade crossing, where plaintiff drove his automobile upon the track from fifty to seventy-five feet in front of an approaching train, the refusal to give, at the request of the defendant, the following instruction was error: "The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponder-

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CROSSINGS—Continued.

Last Clear Chance—Continued.

ance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident." Norfolk So. R. Co. *v.* Smith, 302.

In an action for personal injuries sustained in an accident at a crossing, it appeared that the plaintiff drove his automobile upon the track of defendant about fifty or seventy-five feet before an approaching train and that plaintiff might have seen one hundred yards or more along the track after he passed a store which, until he was within twenty or more feet of the track, obstructed his view. Plaintiff testified that he never saw the train that struck him. The automobile could have easily been stopped at the speed at which it was going within seven or eight feet. It was demonstrated that the train could not have been moving rapidly at the time of the accident. Held: That, under such circumstances as these, the doctrine of the last clear chance can have no application whatever. The proximate cause of the accident was the negligence of the plaintiff in failing to observe the approaching train, in failing to stop his car before reaching the railroad track, and in stopping it thereon almost immediately before the accident. Norfolk So. R. Co. *v.* Smith, 302.

Look and Listen.—See *infra*, "Contributory Negligence."

The duty to look and listen is not applied with strictness to travelers crossing street railways, as it is with regard to crossing steam railroads. With respect to the former the general rule is that the failure to look and listen is not negligence *per se*, but this general rule is not inflexible, and the final test in every case is whether the court can say that the evidence furnishes no reasonable basis upon which to find that an ordinarily prudent person would have attempted to cross the track under the circumstances of the particular case. Va. Ry. & P. Co. *v.* Boltz, 649.

Presumption and Burden of Proof.—See *infra*, "Contributory Negligence."

Right of Public to Use of Street.—The public has an equal right with the street railway company to ride, drive, and walk upon the street between crossings, subject, however, to the superior right of way of the street cars, due to the fact that such cars must run on the tracks and cannot observe the law of the road. Va. Ry. & P. Co. *v.* Boltz, 649.

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CROSSINGS—Continued.

Street Railroads.—See *infra*, "Contributory Negligence."

CRUELTY TO CHILDREN.

Confessions.—Upon the trial of defendant for cruelty to a boy under his control, a witness for the Commonwealth testified to statements made by the boy to him, which he had repeated to defendant, who had either given satisfactory explanations of them or denied them. Held: That such testimony was purely hearsay and did not amount to a confession by defendant. Flippo *v.* Commonwealth, 854.

Evidence Insufficient to Support Verdict.—In the instant case defendant was tried and convicted and judgment awarded against him for a fine of $50 for unlawfully overworking and cruelly treating a boy thirteen years old, who was under his control. The boy was under the care of the superintendent of the Children's Home Society of Virginia, who testified that he was incorrigible and that he had put him under the care of defendant about four years previous to defendant's conviction, and during that time he had much improved in appearance, mental development and behavior; and that the boy was much opposed to leaving defendant. The boy himself testified that accused was never cruel to him and that he did not want to leave him. The chief witness against defendant, in whose testimony another witness concurred, did not testify to any cruel act of defendant, his testimony merely consisting of what the boy had told him. These statements of the boy were repeated to defendant by this witness and he either denied them or gave satisfactory explanations of them. The evidence as to overworking the boy was very slight. Held: That the evidence, though considered as on a demurrer thereto by defendant, was not sufficient to sustain the verdict. Flippo *v.* Commonwealth, 854.

Hearsay Evidence.—See *infra*, "Confessions."

Right to Inflict Moderate Correction.—Where a boy was placed by the superintendent of the Children's Home Society of Virginia, in whose care he was, with a farmer to bring up, if his conduct was such as to require reasonable and moderate correction for his welfare, it was the right and duty of the farmer to administer it. Flippo *v.* Commonwealth, 854.

DAMAGES.

Exemplary Damages.—See EXEMPLARY DAMAGES.

Libel and Slander.—See LIBEL AND SLANDER.

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DAMAGES—Continued.

Master and Servant.—See MASTER AND SERVANT.

Minimizing Damages.—See MASTER AND SERVANT; see *infra*, "Mitigation of Damages."

Mitigation of Damages.—See LIBEL AND SLANDER.

In a suit for damages for diminution of plaintiffs' water power by defendant, evidence was properly excluded as to how the injury done by the defendant to the plaintiffs might have been minimized in the past, as no one is under obligation to undertake to minimize a threatened or an intermittent voluntary trespass. Norfolk & W. R. Co. *v.* Allen, 603.

The owner of property is not obliged to so use his own property that another may not injure it. If an injury is merely threatened, no action lies for the threat, and the property owner is under no obligation to attempt in advance to minimize the results of a wrong which may never be inflicted. If the injury is intermittent and recurrent, entire damages cannot be recovered in a single action as the injury may never be repeated, and for that reason there is no duty resting upon the party injured to attempt to minimize its consequences. But where the injury is permanent in its character and continuous in its consequences, entire damages may be recovered in a single action, and the duty rests upon the injured party to minimize its consequences if it can be done at moderate expense and by the exercise of ordinary care. Norfolk & W. R. Co. *v.* Allen, 603.

In such a case every time it diminished the plaintiffs' supply of water to their detriment it committed a new trespass, and while the nature of its pumping station indicated that it would probably continue to trespass upon the plaintiffs' property, the latter were under no obligation to presume that it would continue to do so, without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them. Norfolk & W. R. Co. *v.* Allen, 603.

Public Service Corporations.—See EMINENT DOMAIN.

Unliquidated Damages.—See SET-OFF, RECOUPMENT AND COUNTERCLAIM.

DAMNUM ABSQUE INJURIA.

Taking of Property by Public Service Corporation.—Killam *v.* Norfolk & W. R. Co., 541.

DEATH. See DEEDS.

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DEBTS OF DECEDENT. See EXECUTORS AND ADMINISTRATORS.

DECLARATION. See PLEADING.

DECLARATIONS AND ADMISSIONS.

Corpus Delicti.—Independent of statute, the admissions of the accused "are competent evidence tending to prove the *corpus delicti.*" Cochran *v.* Commonwealth, 801.

Domicile.—A testator styled himself as "William C. Smith, of the city of Baltimore, Maryland." Such declaration on his part is entitled to little weight as evidence of his domicile in Baltimore, Maryland. Smith *v.* Smith, 341.

Dying Declarations.—See DYING DECLARATIONS.

Last Clear Chance.—See LAST CLEAR CHANCE.

Wills.—See WILLS.

DECREE. See JUDGMENTS AND DECREES.

DEED OF TRUST. See MORTGAGES AND DEEDS OF TRUST.

DEEDS.

Death of Grantee.—A deed made to a grantee after his death is ineffectual to pass title and void. Stewart *v.* Stewart, 642.

Description of Land.—See SPECIFIC PERFORMANCE.

In a city having a known system of notation, regulated by municipal laws and acted upon by every one, the description of premises in a deed or contract of sale by a number is sufficiently definite. Harper *v.* Wallerstein, 274.

The object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do, without helping evidence—but to furnish the means of identification; when that is done it is sufficient. That is certain which can be made certain, and evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter. Harper *v.* Wallerstein, 274.

Fraudulent and Voluntary Conveyances.—See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Parol Evidence.—See *infra*, "Description of Land."

Recording Acts.—See RECORDING ACTS.

DEFINITIONS. See WORDS AND PHRASES.

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DEL CREDERE FACTORS. See FACTORS AND COMMISSION MERCHANTS.

DELIVERY. See GIFTS.

DEMURRER. See PLEADING.

Indictment and Information.—Where every fact charged in an indictment may be true and yet the accused be guilty of no offense, the indictment is bad on demurrer. Blair *v.* Commonwealth, 798.

DEMURRER TO EVIDENCE.

Appeal and Error.—Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal. Ches. & O. R. Co. *v.* National Bk., 471.

Carriers.—Where in an action against a carrier the evidence for the defendant tending to bring the case within a common law exception was in conflict with the evidence for the plaintiff tending to show a contrary state of facts, such evidence for defendant was waived by its demurrer to the evidence and cannot be considered on appeal. Ches. & O. R. Co. *v.* National Bk., 471.

DEPOSITIONS.

Appeal and Error.—In a suit for damages for diminution of water power, where an issue to a jury was awarded to determine the amount of damages to be awarded to the plaintiffs for the injuries sustained, the Supreme Court of Appeals will not treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions. Norfolk & W. R. Co. *v.* Allen, 603.

DESCENT AND DISTRIBUTION.

Advancements.—See ADVANCEMENTS.

DESERTION. See DIVORCE.

DISCLAIMER. See COSTS.

DIVORCE.

Collateral Attack.—See *infra*, "Judgment in Divorce Suit as to Property Rights of Parties."

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DIVORCE—Continued.

Conclusiveness of Judgment.—See *infra*, "Judgment in Divorce Suit as to Property Rights of Parties."

Desertion.—In a suit for divorce from bed and board on the ground of desertion, the divorce should be granted where the unimpeached and uncontroverted evidence showed that the defendant abandoned his wife without sufficient cause, telling her "that he was going away and did not want to have anything more to do with her, and would not ask her to live with him again;" and, that the only reason assigned by him for deserting his wife was that she had contracted an account in the neighborhood for food and clothing. It also appeared that, although defendant lived in the same county with plaintiff until a short time before the taking of the depositions in the case, he made no effort to communicate with her by word or letter; that he was personally served with process in the suit, but neither appeared nor answered the bill, nor introduced any evidence in his own behalf. Good *v.* Good, 30.

Dower.—See *infra*, "Judgment in Divorce Suit as to Property Rights of Parties;" "Property Rights."

Evidence.—See *infra*, "Desertion."

Judgment in Divorce Suit as to Property Rights of Parties.—A decree in a suit for divorce in favor of a husband against his wife for desertion contained the following provision: "The court doth further adjudge, order and decree that the marital rights of each party to this suit in and to any property owned by the other party be and the same are hereby extinguished." After the death of the husband the divorced wife instituted suit claiming dower in the real estate of her divorced husband, and a distributive share of his personal estate. Held: That the decree in the divorce suit was intended to exclude the wife's rights to claim dower upon the death of the husband, or an interest in his personal estate; and, that the language used was adequate to that purpose; and, as the subject was within the jurisdictional power of the circuit court, and the parties were before the court, the decree in the divorce suit, which has never been reversed or annulled, must conclusively be presumed to be correct, and it cannot be collaterally assailed in the instant suit. Gum *v.* Gum, 32.

Code of 1904, section 2263, provides that the circuit court may not only grant decrees for divorce but "may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them."

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DIVORCE—Continued.

Judgment in Divorce Suit as to Property Rights of Parties.—Continued.

It was argued that the contingent right of dower in the real estate, and the prospective right to a distributive share of the personal estate were not "estates," as that term is used in the statute. Held: That, while the contingent right of dower is not technically an estate but is a mere lien which may be released or relinquished, it is still a valuable property right, and the statute intended to confer upon the court the right not only to settle the status of the parties, but the future rights of each in the property of the other. Furthermore, the court has the right to make decrees concerning the estate of either party, and in the instant case a decree extinguishing the marital rights of the wife in her husband's property concerns the estate of the husband as well as the contingent rights of the wife, and it would seem clear from the very language of section 2263 that the court had this power. Gum *v.* Gum, 32.

The discretion given to the court under Code of 1904, section 2263, to settle the rights of each party in respect to the property of the other must not be exercised arbitrarily, but the court must be guided by law and established principles relating to the subject. But whether or not the discretion was properly exercised, or the power given by the statute was properly exerted, are questions that are concluded by the decree in the divorce suit. Gum *v.* Gum, 32.

Property Rights.—See *infra*, "Judgment in Divorce Suit as to Property Rights of Parties."

Divorce a Mensa et Thoro.—At common law a decree *a mensa et thoro* had no effect on the property rights of the parties, as there was no dissolution of the bond of matrimony, and they still remained husband and wife; and the same is true in Virginia in the absence of any order in the sentence of divorce, unless the separation is made perpetual, and, if, in a divorce *a mensa et thoro*, the separation is made perpetual, then it operates like a divorce *a vinculo* in respect of *after acquired* property, barring the claim of dower or of curtesy as to such property. Gum *v.* Gum, 32.

Section 2263 of the Code of 1904 provides that whether the divorce be from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, so that while the decree for a divorce *a mensa et thoro* does not affect the property rights of the parties if it is silent on that subject, yet the court may make such order with reference thereto as to it shall seem expedient.

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DIVORCE—Continued.

Property Rights—Continued.

Divorce a Mensa et Thoro—Continued.

And as to existing property, the court has a right under this section to settle the rights of each party in respect to the property of the other, and if need be to extinguish them. Gum *v.* Gum, 32.

Divorce a Vinculo.—At common law, a divorce *a vinculo* could only be granted by the courts for a cause existing at the time of the marriage, and when the divorce was granted for such cause it avoided *ab initio* the property rights of the parties, so that there was neither dower nor curtesy in property then existing or thereafter acquired, and divorces for supervening causes could only be granted by act of parliament, which then became the law in the case. Gum *v.* Gum, 32.

In Virginia, where the divorce *a vinculo* determines the marriage *ab initio*, no marital right and consequently no right of dower or curtesy attaches, but where it is avoided for a supervening cause, and the marriage is void only from the date of sentence, it is said that, in the absence of any special provision in the sentence itself, dower and curtesy having attached already to the existing property of the parties are not as to that property impaired by the divorce. Gum. *v.* Gum, 32.

DOCUMENTARY EVIDENCE.

Constitutional Law.—The constitutional right of a defendant in a criminal prosecution to be confronted with his accusers and witnesses does not exclude proper documentary evidence. Documentary evidence is admissible in criminal as in civil cases, under the same rules which define and limit its admissibility. Cochran *v.* Commonwealth, 801.

Intoxicating Liquors.—There is no merit in a contention that, in a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the record of the express company and affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved. Cochran *v.* Commonwealth, 801.

Books of Account.—The admission of books of account, the entries having been made by the bookkeeper under the direction of some one familiar with the facts at or near the time of the transaction, in the usual course of business, is clearly proper and everywhere accepted. Allen *v.* Commonwealth, 834.

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DOCUMENTARY EVIDENCE—Continued.

Letters.—See INTOXICATING LIQUORS.

Letters as Evidence.—The accused sought to introduce two letters, in order to support his claim that he had secured employment in North Carolina and was on his way to accept it at the time he was arrested. Held: That the court properly refused to admit these letters in evidence, because they were in no way identified as genuine. Lucchesi *v.* Commonwealth, 872.

Record of School Board.—The records of a school board are books of original entry and are admissible in evidence to show the acts of the board with reference to the purchase of property by it. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

DOMICILE.

Declarations and Admissions.—A testator styled himself as "William C. Smith, of the city of Baltimore, Maryland." Such declaration on his part is entitled to little weight as evidence of his domicile in Baltimore, Maryland. Smith *v.* Smith, 341.

Evidence.—See *infra*, "Declarations and Admissions;" "Probate of Will."

Full Faith and Credit.—See *infra*, "Probate of Will."

Probate of Will.—The probate of a will is not evidence in a collateral proceeding of the domicile of the testator, and other tribunals are not precluded from inquiring into the real domicile. The full faith and credit due to the proceedings of a sister State do not require that the courts of a State shall be bound by its adjudication on the question of domicile. In the trial of a collateral issue, it is open to the courts of any State to determine, upon the evidence produced, the true domicile of the deceased. Smith *v.* Smith, 341.

Residence.—The words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification. To acquire a domicile in a particular place, there must be a residence there, and intention to make that place home. Smith *v.* Smith, 341.

Wills.—Although a testator died in Baltimore, Maryland, and through the necessity of his business was a resident of that city, yet it was held from his purchase of a farm in Virginia, and his relation to it, and from other evidence, that his domicile was in Virginia. Smith *v.* Smith, 341.

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DONATION. See CHARITIES.

DOWER.

Divorce.—See DIVORCE.

Estates.—Whether contingent right of dower is an "estate." Gum *v.* Gum, 32.

DRAINS AND SEWERS.

Mandamus.—By an act of Assembly it was the duty of defendant railroad to drain an old canal bed, so as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected. Held: That the discharge of the duty in question could be fully enforced, if need be, by the appropriate remedy of mandamus. Ches. & O. R. Co. *v.* Catlett, 232.

DRUMMERS. See COMMERCIAL TRAVELERS OR DRUMMERS.

DUPLICITY. See PLEADING.

DYING DECLARATIONS.

Inadmissible Except in Cases of Homicide.—Upon the trial of a husband for an assault on his wife, the dying declarations of his wife are inadmissible against him, where it appeared that her death was not the result of the assault upon her, but was caused by her taking poison with suicidal intent. Taylor *v.* Commonwealth, 886.

ELECTION. See INDICTMENT AND INFORMATION.

EMINENT DOMAIN.

Entertaining Commissioners.—In eminent domain proceedings counsel for the landowners arranged with the husband of one of the landowners for the entertainment at dinner of the commissioners and counsel at his house, before viewing the premises or making a report of their findings. This arrangement became known to at least two of the commissioners before the arrival of the senior counsel for the corporation seeking to condemn the land. Upon the arrival of the senior counsel for the corporation, counsel for the landowners informed him that the husband had been directed "to prepare dinner for everybody who was there if it was agreeable to him." The senior counsel replied that he was very glad that

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EMINENT DOMAIN—Continued.

Entertaining Commissioners—Continued.

this had been done. Counsel for the corporation when he consented to the arrangement was unaware of the decision in *New River, etc., Railway Company* v. *Honaker*, 1119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132. Held: That there was error in the action of the trial court in overruling an exception on the part of the corporation to the report of the commissioners, on the ground that they had been entertained by the landowners. Va.-Western Power Co. *v.* Kessinger, 135.

If prior to the possibility of any information of it having reached any of the commissioners, the landowners or their counsel had conferred with the company or its counsel on the subject, and the company, in person or by counsel, had consented to the entertainment being given, a different case would be presented, to which the rule in *New River, etc., Railway Company* v. *Honaker*, 119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132, might not apply. Va.-Western Power Co. *v.* Kessinger, 135.

As counsel for the company had but scant time for reflection and besides did not then know of the recent ruling in *New River, etc., Railway Company* v. *Honaker*, 119 Va. 641, 89 S. E. 960, Ann. Cas. 1917C, 132, it would not be just or right to apply any rule of estoppel or waiver in the instant case. Va.-Western Power Co. *v.* Kessinger, 135.

Estoppel.—See *infra*, "Entertaining Commissioners."

Instructions as to Duties of Commissioners.—In eminent domain proceedings the statute (subsection 6 of section 1105-f, Code of 1904), is sufficiently specific as to what are the duties of the commissioners in the premises, and if the orders of court appointing commissioners substantially contain instructions as to what all of such duties are as prescribed by statute, as they did in the instant case, that is sufficient; and the trial court may, and properly should, refuse to give any further instructions defining what such duties are. But as to the manner in which the commissioners should discharge their statutory duties, it would be helpful to the commissioners and greatly tend to the proper discharge of their duties if the courts appointing them would, on their own motion, or upon request of any party to the case, instruct the commissioners as to what character of testimony and argument or statements of counsel are admissible or inadmissible before them; and caution them not to discuss the case in any aspect of it with any one other than among them-

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EMINENT DOMAIN—Continued.

Instructions as to Duties of Commissioners—Continued.

selves or allow it to be discussed in their presence, except when together assembled for and engaged in the discharge of their duties in public as commissioners as the statute provides. Va.-Western Power Co. *v.* Kessinger, 135.

Notice to Commissioners of Their Appointment.—The practice of counsel in a case notifying the commissioners of their appointment in condemnation proceedings should be discontinued. The notice of their appointment and of the date fixed for the view should be communicated to the commissioners or to the minimum number authorized to act, if only such number is desired to act, by the clerk or other disinterested person, as the order of court may especially direct by consent of all parties to the case, or in the absence of such consent by a certified copy of the order being delivered to the commissioners by the sheriff of the county or sheriff or sergeant of the city in the court of which the proceedings are had. Va.-Western Power Co. *v.* Kessinger, 135.

Public Service Corporations.—*Private Capacity.*—When a public service corporation acts in its private capacity, mere general legislative authority to establish, locate and operate its works will not confer upon it immunity from liability for damages resulting from a construction and operation of such works which would have been deemed a private nuisance at common law. Killam *v.* Norfolk & W. R. Co., 541.

If such works were not constructed for the very public duties for which the public service corporation was incorporated, but as incidental, adjunctive or appurtenant thereto merely, however necessary to the performance of the former duties, their operation will be considered and classed as an operation by the corporation in its private capacity. In such case the rule *sic utere tuo ut alienum non leadas* applies and controls the construction of the legislative enactment. The general legislative authority to locate, construct and operate the latter character of works will not be construed by implication to confer the immunity from liability for damages, and the harsh rule of *damnum abseque injuria* has no application. Killam *v.* Norfolk & W. R. Co., 541.

Public Capacity.—If a public service corporation in locating, constructing or changing the construction, and in the operation of its works, acts in its public capacity, general legislative authority given it so to do, when strictly pursued, unless that authority is limited or annulled by constitutional provision (whether the provision of the Virginia

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EMINENT DOMAIN—Continued.

Public Service Corporations—Continued.

Public Capacity—Continued.

Constitution of 1902 on the subject of private property being damaged for public uses without just compensation does or does not so limit such authority, it was not necessary to determine in the instant case), will be construed to confer on the corporation immunity from all liability for damages, not imposed by statute law, for such location, construction, change of construction, and operation. Such immunity is inseparably attendant upon the sovereign right of eminent domain which the legislature exercises untrammelled and unabridged, save only as it may be restrained by the Constitution, and it will be construed to be conferred on such a corporation by necessary implication by general legislative enactment on the subject where the corporation acts in its public capacity. In such case the harsh rule of *damnum absque injuria* applies in bar of all suits against the corporation for damages not allowed by statute. Killam *v.* Norfolk & W. R. Co., 541.

Railroads.—When railroad appurtenances, such as a round house, *switch yards*, repair shops or *terminal plant*, cause a nuisance to neighboring property by reason of noise, smoke, cinders, vibration, etc., there may be a recovery, where the switch yard operation complained of does not serve a passenger station or freight depot, so that such operation is not required of the railroad company in the discharge of its public duty in connection with such station or depot. Killam *v.* Norfolk & W. R. Co., 541.

In the case at bar plaintiff instituted an action at law against defendant for damages alleged in the declaration to consist of the diminution of the market and rental value of certain land, dwelling house and other buildings thereon, located near defendant's terminal yard. It appeared that the tracks on such yard near to plaintiff's property were practically level when the dwelling house was erected and served as tracks for the reception, storing and retraining of cars, and that the damages were caused by a change of construction and operation by defendant of that portion of its tracks which were on the part of the terminal yard near to plaintiff's property. The change complained of was the construction of a large embankment, called a "hump," passing plaintiff's property and laying tracks thereon, and the propelling of trains of coal cars by engines other than those that brought the cars to the terminal yard up the grade by the plaintiff's property, causing loud noises, vibrations of

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EMINENT DOMAIN—Continued.

Railroads—Continued.

the dwelling house and vast volumes of smoke, cinders, ashes and gases. Held: That the new construction and operation of the part of the terminal yard complained of was but an operation merely incidental to the duties of the defendant which it performed in its public capacity. Killam *v.* Norfolk & W. R. Co., 541.

The change of method of operating the terminal yards in the instant case consisted, in ultimate fact, in withdrawing the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing (and) retraining" of cars; and the subsequent use of such tracks for the "transportation" of cars of coal; but such transportation was essentially a rehandling—a retraining—a switching yard transportation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation. Killam *v.* Norfolk & W. R. Co., 541.

Repair Shops.—See *infra*, "Railroads."

Switch Yards.—See *infra*, "Railroads."

Terminal Plant.—See *infra*, "Railroads."

Trespass.—A railroad company is no less a trespasser when it diminishes the water power of a mill owner because it intended to exercise its right of eminent domain than if it entertained no such intention. Norfolk & W. R. Co. *v.* Allen, 603.

In such a case every time it diminished the plaintiffs' supply of water to their detriment it committed a new trespass, and while the nature of its pumping station indicated that it would probably continue to trespass upon the plaintiff's property, the latter were under no obligation to presume that it would continue to do so, without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them. Norfolk & W. R. Co. *v.* Allen, 603.

Waiver.—See *infra*, "Entertaining Commissioners."

ENGINEER. See LICENSES.

EQUITY.

Adequate Remedy at Law.—See "Adequate Remedy at Law."

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EQUITY—Continued.

Creditors' Suits.—See CREDITORS' SUITS.

Injunction.—See INJUNCTION.

Jurisdiction.—See JURISDICTION.

Resort to Court for Direction and Advice.—See EXECUTORS AND ADMINISTRATORS.

Specific Performance.—See SPECIFIC PERFORMANCE.

ERROR, WRIT OF. See APPEAL AND ERROR.

ESTATES. See WILLS.

Definition.—Meaning of the term as used in Section 2263, Code of 1904. Gum *v.* Gum, 32.

Dower.—Whether contingent right of dower is an "estate." Gum *v.* Gum, 32.

Estate for Life.—A gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income. Wise and Others *v.* Commonwealth, 693.

Fee Simple.—A fee simple is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple. Smith *v.* Smith, 341.

Gift of Income.—See *infra*, "Estate for Life."

Life Estates.—See TAXATION; *infra*, "Estates for Life."

EVIDENCE.

Appeal and Error.—See APPEAL AND ERROR.

Books as Evidence.—See DOCUMENTARY EVIDENCE.

Burden of Proof.—See PRESUMPTION AND BURDEN OF PROOF.

Certificates of Exception.—See EXCEPTIONS, BILL OF.

Certification of Evidence.—See APPEAL AND ERROR.

Conflicting Evidence.—See APPEAL AND ERROR; NEW TRIALS.

Corpus Delicti.—See CORPUS DELICTI.

Declarations and Admissions.—See DECLARATIONS AND ADMISSIONS.

Divorce.—See DIVORCE.

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EVIDENCE—Continued.

Documentary Evidence.—See DOCUMENTARY EVIDENCE.

Domicile.—See DOMICILE.

Dying Declarations.—See DYING DECLARATIONS.

Evidence in Possession of Defendant.—In an action against a railroad company for damages from fire set out by an engine of the company, there was no direct evidence that any engine of any train of defendant passed the point where the fire originated shortly before the fire. The evidence for the plaintiff on this point was wholly circumstantial. It consisted in proving that a mail train of the defendant was, by its schedule of trains, due to pass along by such point at such time. Held: That in view of the fact that definite evidence of the exact time at which the train passed was peculiarly within the possession of the defendant, being furnished by its record of the movement of its trains, the testimony for plaintiff furnished *prima facie* evidence of the fact that the train ran on time on the day in question, and hence passed the point of origin of the fire a short time before the fire originated. The defendant having failed to introduce any evidence to rebut the *prima facie* proof aforesaid, such proof became conclusive of the fact in question. Ches. & O. R. Co. *v.* Ware, 246.

Exceptions and Objections.—Although evidence might, upon objection, have been properly excluded as hearsay evidence, where no objection was offered to its introduction, it must, on appeal, be regarded as a part of the evidence before the jury. Taylor *v.* Commonwealth, 886.

Hypothetical Question.—See EXPERT AND OPINION EVIDENCE.

Expert and Opinion Evidence.—See EXPERT AND OPINION EVIDENCE.

Fires.—See FIRES.

Hearsay Evidence.—See LIBEL AND SLANDER.

Inference from a Presumption.—See CIRCUMSTANTIAL EVIDENCE; PRESUMPTION AND BURDEN OF PROOF.

Instructions.—See *infra*, "Striking Out Evidence."

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Libel and Slander.—See LIBEL AND SLANDER.

Order of Proof.—See ORDER OF PROOF.

Other Transactions.—See *infra*, "Res inter Alios Acta."

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EVIDENCE—Continued.

Parol Evidence.—See PAROL EVIDENCE.

Possession of Defendant.—See *infra*, "Evidence in Possession of Defendant."

Preponderance of Evidence.—*General Rule.*—In civil cases the reasoning to establish a fact is not required to measure up to the exclusion of every other hypothesis consistent with the evidence; and it is required only that the fact considered as established be the more probable hypothesis from the evidence with reference to other hypotheses predicated upon the evidence—that is to say, in civil cases, a fact may be established by a preponderance only of the evidence. But the preponderance of the evidence rule does not dispense with the requirement that there must be come evidence which has some logical probative value to establish a fact, before that fact can be even considered as a possible hypothesis predicated upon the evidence—*a fortiori*, before it can be considered as the more probable hypothesis from the evidence. Ches. & O. R. Co. *v.* Catlett, 232.

Injury Which May Have Resulted from One of Two Causes.—When damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by the preponderance of the evidence. Ches. & O. R. Co. *v.* Catlett, 232.

In an action for damages against a railroad company caused by the illness of plaintiff and family from malaria, which plaintiff alleged was occasioned by mosquitoes bred in stagnant water in an old canal bed, which by an act of Assembly it was the duty of defendant railroad to drain, the evidence for the plaintiff did not go beyond proving by a preponderance of it, that the water in the canal bed was the most favorable place for the production of mosquitoes. It also appeared from the plaintiff's evidence that the water in other places near by was favorable for the production of a sufficient number of mosquitoes to have caused the malaria complained of. There was no evidence to show that the one breeding place was more probable than the other of the mosquitoes which caused the malaria complained of, except the fact that more mosquitoes were probably bred in the water in the canal bed than in the water in the other places.

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EVIDENCE—Continued.

Preponderance of Evidence—Continued.

Injury Which May Have Resulted from One of Two Causes—Continued.

Held: That a verdict for plaintiff upon this evidence must be set aside and annulled and a new trial granted. Ches. & O. R. Co. *v.* Catlett, 232.

Presumption Based upon Presumption.—See CIRCUMSTANTIAL EVIDENCE; PRESUMPTIONS AND BURDEN OF PROOF.

Presumptions and Burden of Proof.— See PRESUMPTIONS AND BURDEN OF PROOF.

Res Gestae.— See RES GESTAE.

Res inter Alios Acta.—See FIRES.

In the instant case, at least one witness for the plaintiff testified that engine number eleven as well as engine number twelve had passed the place where the fire originated shortly before it broke out. It was, therefore, competent for the plaintiff to show the bad condition of engine number eleven soon after the fire, and the exclusion of evidence that engine number eleven had been seen to set out a fire shortly after the fire in question was erroneous. Abernathy *v.* Emporia Mfg. Co., 406.

Searches and Seizures.— See SEARCHES AND SEIZURES.

Striking Out Evidence.—Where improper evidence has been admitted, in either a civil or a criminal case, the error is rendered harmless by the subsequent action of the trial court in striking out the evidence and specifically instructing the jury to disregard it, unless from the circumstances of the particular case there be reason to apprehend that such improper evidence has prejudiced the minds of the jury, in which latter event the error is reversible. Taylor *v.* Commonwealth, 886.

In the instant case, where the dying declarations of a wife were admitted in evidence against her husband, upon his trial for assault on the wife, although her death was caused by her taking poison, a review of the evidence satisfied the Supreme Court of Appeals that the jury obeyed the instructions of the trial court to disregard the dying declaration. It is not necessary to believe that the jury entirely effaced from their minds the fact that improper evidence had been introduced, and in the instant case there was abundant evidence upon which the verdict might have been found, if the declaration had not been introduced. Taylor *v.* Commonwealth, 886.

The jury are presumed to follow the direction of the court to disregard wrongly admitted evidence, at whatever stage of the case that direction may be given. Taylor *v.* Commonwealth, 886.

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EVIDENCE—Continued.

Sufficiency.—See *infra*, "Weight and Sufficiency."

Variance.—See VARIANCE.

Weight and Sufficiency.—See *infra*, "Preponderance of Evidence."

A fact cannot be established, whether by direct (testimonial) or circumstantial evidence unless there is some evidence which has some logical probative value to establish the fact. Ches. & O. R. Co. *v.* Catlett, 232.

Wills.—See WILLS.

EXCEPTIONS AND OBJECTIONS. See APPEAL AND ERROR; EVIDENCE.

Hypothetical Question.—See EXPERT AND OPINION EVIDENCE.

Jurisdiction.—See JURISDICTION.

EXCEPTIONS, BILL OF.

Assignments of error as to the overruling or sustaining of objections to the reception of testimony, cannot be considered in the appellate court where they are not presented in the record either by bills of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708). Walters *v.* Norfolk & W. Ry. Co., 149.

Abolition of Bill of Exceptions.—The act of March 21, 1916 (Acts 1916, page 722), preserving bills of exception, was made an emergency act, and went into effect immediately and contained no repealing clause, whereas the act of March 21, 1916 (Acts 1916, page 708), abolishing bills of exception, was not an emergency act, and, by constitutional provision (Constitution 1902, section 53, article IV), did not take effect until ninety days after the adjournment of the legislature; and it expressly repealed all statutes in conflict with it. Consequently, there was no antagonism between the two statutes. The emergency act was operative at once, and continued in force during the interval between its passage and the time at which the act abolishing bills of exceptions took effect, when it was immediately repealed. Ellis *v.* Town of Covington, 821.

The act abolishing bills of exception, now in force (Acts 1916, page 708), was intended to simplify the procedure, and is very liberal in its provisions as to what shall constitute a sufficient certificate. While forms of certificates are prescribed by section 4 of the act, the next succeeding section declares, "that in all cases * * * it shall be sufficient

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EXCEPTIONS, BILL OF—Continued.

Abolition of Bill of Exceptions—Continued.

that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with, the provisions of this act." Other provisions of the act are equally liberal. The mere form of the exception, therefore, even a formal bill of exception under the former practice, will not prevent its consideration, if the provisions of the act are substantially complied with. Ellis *v.* Town of Covington, 821.

Omission of Bills of Exception from Record.—See *infra*, "Recordation."

Plea to the Jurisdiction.—An order of court holding that a plea to the jurisdiction was bad, is clearly a judgment upon the pleadings, and requires no exception to be stated in the order and no bill of exception to preserve the rights of the defendant thereunder, although a plea never authoritatively in the record, or being thus in is expressly stricken out, must be made the subject of a bill of exceptions, or an express order of the court, to make it a part of the record on appeal. Bank of Bristol *v.* Ashworth, 170.

Recordation.—*Omission of Bills of Exception from Record.*—A motion to dismiss a writ of error was based upon the fact that the petition, when presented to the judge awarding the writ, was not accompanied by a complete transcript of the record, as by some inadvertence the bills of exception were omitted. Afterwards and before the motion was presented to the court, the plaintiffs in error applied to one of the judges of the Supreme Court of Appeals under section 3463, of the Code of 1904, for a writ of *certiorari*, requiring the clerk to transmit such portions of the record as had been theretofore omitted from the transcript. In response to this writ, the record was completed long before the motion was made, and was amply sufficient to present for the consideration of the court all of the errors which were assigned in the petition. The motion to dismiss the writ was therefore overruled. Bowen's Ex'or *v.* Bowen, 1.

EXECUTORS AND ADMINISTRATORS.

Adequate Price.—See *infra*, "Sale of Realty to Pay Debts."

Advancements.—See ADVANCEMENTS.

Costs.—Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate, his costs are taxed against the estate. Bowen's Ex'or *v.* Bowen, 1.

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EXECUTORS AND ADMINISTRATORS—Continued.

Debts of Decedent.—See *infra*, "Executor's Sale;" "Order of Payment of Debts of Decedent."

Executor's Sale.—A sale made by order of a court of competent jurisdiction, *pendente lite*, is a judicial sale. Thus, where an executor having authority under a will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is irdered to make sale and to report it to the court for confirmation, which he does, the sale is a judicial sale. Sproul *v.* Hunter, 102.

Facts held to constitute the sale a judicial one. Sproul *v.* Hunter, 102.

Under the circumstances set forth in syllabus 3, testator's will was the source of appellant's title, and that instrument and the petition for the sale apprised the intending purchasers that the farm for which they were negotiating was supposed to contain 775 acres. Still, they stood by and suffered the court to direct the sale upon that assumption, and afterwards to confirm it, without objection. At a subsequent term, it is true, they sought the aid of the court to relieve themselves from the consequences of an assumed deficiency of acreage in the farm. But the sale was a judicial sale, and the doctrine is well settled in this jurisdiction that the principle of *caveat emptor* strictly applies to judicial sales. Speaking generally, all objections of which the party complaining had previous knowledge come too late after a decree of confirmation. Sproul *v.* Hunter, 102.

The personal estate of an intestate is the primary fund for the payment of his debts, and until the amount thereof has been ascertained it cannot be told to what extent it will be necessary to resort to the real estate. The lands of a decedent ought not to be sold for the payment of his debts until the court has first ascertained the debts of the decedent and their relative priorities, if any, and the amount of his personal estate applicable thereto. The object of the rule is that the land shall be sold under such conditions as will realize the best price therefor. The rule is well settled that it is error to decree a sale of land for the payment of the liens thereon until there has first been an account of such liens and their relative priorities, if any, and the reason of the rule is equally applicable to the sale of the lands of a decedent for the payment of his debts. Kirby *v.* Booker, 291.

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EXECUTORS AND ADMINISTRATORS—Continued.

Executor's Sale—Continued.

A decree was entered for the sale of the real estate of a decedent in a creditor's suit to subject the real and personal estate of the decedent to the payment of his debts. The suit was instituted by an attorney at law, suing on behalf of himself and all other creditors of the decedent, to enforce the collection of a claim for attorney's fees. The only heir of the decedent was a daughter five years of age. The suit was referred to a commissioner to take an account of the real estate and personal estate of the decedent, and an account of the debts, liens and demands against the estate of the decedent. The report of the commissioner did not furnish definite information as to either the assets or liabilities of the decedent and therefore the record was in no condition to enable the court below to enter a decree for sale. Kirby *v.* Booker, 291.

It was insisted in the instant case that the sale was a fair one, the price adequate and that the sale should not be set aside for the slight incompleteness of the commissioner's report; and also that the debts were far in excess of the value of the land and in no event could the heir be benefited, and that no creditor was complaining. However, one of the exceptions to the report of the sale was "an utterly inadequate price" obtained for the property, upon which the lower court refused to pass. Under these circumstances the Supreme Court of Appeals cannot tell whether the land sold for a fair price or not. The only heir of the decedent is an infant of very tender years and cannot put in an upset bid for the land, no account of the personal estate of the decedent has been taken, and no accurate report has been made of debts due by the defendant, and of the liens on his real estate. For these reasons, the decree of the circuit court setting aside the sale was affirmed. Kirby *v.* Booker, 291.

Judicial Sales.—See *infra*, "Executor's Sale."

Life Insurance.—See LIFE INSURANCE.

Order of Payment of Debts of Decedent.—See LIFE INSURANCE.

Where creditors will not be prejudiced thereby, every man has the right, by act *inter vivos* or by will, to appropriate his property to the payment of his debts in any order he may see fit. While, ordinarily, personal estate is the primary fund for the payment of the debts of a decedent, he may change that order, if he pleases, and the law will generally recognize and enforce it. Walker *v.* Penick's Ex'or, 664.

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EXECUTORS AND ADMINISTRATORS—Continued.

Resort to Court for Direction and Advice.—See *infra*, "Executor's Sale."

Although executors have power under the will to sell the property belonging to the estate, the possession of such authority in no way deprives them of the right to go into a court of equity for aid and guidance in the discharge of their duties, and to have the property sold under its decree. Sproul *v.* Hunter, 102.

Sale of Realty to Pay Debts.—See *infra*, "Executor's Sale."

Sales, Mortgages or Pledges.—See *infra*, "Executor's Sale."

EXEMPLARY DAMAGES.

Admissibility of Evidence of Wealth of Defendant.—Norfolk & W. R. Co. *v.* Allen, 603.

Waters and Watercourses.—See WATERS AND WATERCOURSES.

EXPERT AND OPINION EVIDENCE.

Exceptions and Objections.—See *infra*, "Hypothetical Question."

Hypothetical Question.—Hypothetical questions propounded to expert alienists as to the testamentary capacity of the testator fairly embodied, in narrative form, the evidence relied upon by the opponents of the will to show the incapacity of the testator. Held: That general objections to the questions not specifying what particular parts of the questions or answers were objected to, if overruled, were of no avail on appeal. Bowen's Ex'or *v.* Bowen, 1.

While it is perfectly well settled that a hypothetical question to an expert witness must embody all of the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion, it is not necessary that such question should embody all of the immaterial facts. If there be any facts or testimony omitted which the exceptant thinks are material, it is his duty to clearly indicate such defects to the court, and thereupon the court should require the propounder of the question to supply such omissions in the question as are material, so as to enable the expert to answer the question after being fully and definitely informed of all of such material facts. Bowen's Ex'or *v.* Bowen, 1.

Suggestions as to the insufficiency of the hypothetical questions which are made in the petition for writ of error

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EXPERT AND OPINION EVIDENCE—Continued.

Hypothetical Question—Continued.

and brief of counsel should have been made in the trial court, and it is too late to make such suggestions for the first time on appeal. Bowen's Ex'or *v.* Bowen, 1.

Yard Brakeman.—Testimony as to the distance within which a car could be stopped by one who had had thirteen years' experience as yard brakeman, and who was furnished full information as to the size and character of the car, the rate of speed at which it was running, the condition of the brakes and the grade of the track, is not without probative value. Such evidence is usual and appropriate for the purpose for which it was introduced. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

FACTORS AND COMMISSION MERCHANTS.

Del Credere Factors.—A *del credere* factor, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; he is distinguished from other agents in that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. The relation of a *del credere* agent to his principal is that of debtor and creditor, and he is bound absolutely to see that his principal is paid, and he may be sued in *indebtitatus assumpsit* if he does not pay the sale debt when due. *Del credere* guaranties are held not to be within the statute of frauds, as being promises to answer for the debt, default, or miscarriage of another, but are original agreements of suretyship and may be proved by parol. Pocahontas Guano Co. *v.* Smith, 318.

Distinction between Contract of Sale and Consignment of Goods to a Factor.—The distinction between a contract of sale and a consignment of goods to a factor is that in the case of a sale the title passes to the buyer, while in the case of a consignment to a factor the possession passes to the factor but the title remains in the consignor. Where goods are delivered by one party to another, to sell for the party delivering them, it creates the relation of agency and the title remains in the principal, and the factor or agent is liable to pay, not a price, but to account for the proceeds of the goods when sold. If, however, it appears from the whole agreement that it is the intention of the parties that the title to the goods is to pass to the party receiving them, for a price to be paid by him, then the transaction is a sale. Pocahontas Guano Co. *v.* Smith, 318.

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FACTORS AND COMMISSION MERCHANTS—Continued.

Distinction between Contract of Sale and Consignment of Goods to a Factor—Continued.

Where a contract contains some provisions characteristic of a sale and others characteristic of a consignment to a factor to determine whether it is a sale or a consignment, there must be applied to it the familiar rules of construction, all of which are subordinate to the leading principle, that the intention of the parties must prevail, unless inconsistent with some rule of law. Pocahontas Guano Co. *v.* Smith, 318.

In the instant case, the contract under consideration amounted merely to a consignment of fertilizers by one party to another to be sold by the latter for the benefit of the former, who has never parted with the title, and there was no element of purchase in the agreement. In such case, the relation is that of principal and factor, and not of seller and buyer. The fundamental difference between the agreement in *Arbuckle Bros.* v. *Gates*, 95 Va. 802, 30 S. E. 496, and others of that type, called "special selling factor appointment," and the agreement in the case at bar, is that in the former the consignees acquired such an interest in the property under the agreement that the title passed, and the consignor was the seller and the consignee the buyer of the property; while, in the latter case, the title remained in the consignor and only the possession of the fertilizers passed to the consignee. Pocahontas Guano Co. *v.* Smith, 318.

Special Selling Factor Appointment.—See *infra*, "Distinction between Contract of Sale and Consignment of Goods to a Factor."

FEATHERSTON ACT. See FIRES.

FEE SIMPLE. See ESTATES.

FELLOW SERVANTS.

Abolition of Rule as to Railroad.—A company chartered by the General Assembly as a railway corporation by a special act, but operated exclusively in connection with another corporation, a cement company, for the private purposes of the latter, both corporations being under one common ownership and control, its engines being propelled by steam, and doing regularly the sort of work which imparts peculiar hazard to the business of railroads, is a railroad company within the provisions of section 162, Constitution of 1902, section 1294-k, Code of 1904, abolishing the fellow-servant doctrine. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

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FELLOW SERVANTS—Continued.

Railroads.—See *infra*, "Abolition of Rule as to Railroad."

FERTILIZER.

Agent's Commission.—See AGENCY.

FILING. See AFFIDAVITS; PLEADING.

FIRE INSURANCE.

Sales.—See SALES.

FIRES.

Allegation of Negligence.—Under the Featherston act (Acts 1908, page 388), it is not necessary in an action for damages by fire against a railroad for the plaintiff to allege that the fire was negligently set out by the defendant, and such allegations in a declaration may be regarded as surplusage. Ches. & O. R. Co. *v.* Ware, 246.

Appeal and Error.—See *infra*, "Engine Throwing Out Sparks."

Burden of Proof.—See *infra*, "Presumptions and Burden of Proof."

Circumstantial Evidence.—Notwithstanding that there was no direct evidence before the jury that a train had in fact passed the point of origin of the fire at or about the time of the fire in question, where such fact was established by circumstantial evidence, the jury may infer from the fact of the passage of the train at that time, in connection with other facts, that the fire was set out by the train as it passed the point of origin of the fire. Ches. & O. R. Co. *v.* Ware, 246.

Condition of Right of Way.—In an action for damages the jury were instructed that if they "believe from the evidence that the fire in question originated on the right of way of the defendant by the emission of sparks or coals of fire, yet if they believe from the evidence that said right of way was reasonably clear of combustible materials liable to ignition, then the defendant is not liable," is erroneous. The instruction should have gone further and said, that if the right of way was reasonably clear of combustible material, and the defendant's locomotives were equipped with the best appliances in known practical use, that they were in good order and carefully operated, then and in that event they should find for the defendant. Abernathy *v.* Emporia Mfg. Co., 406.

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FIRES—Continued.

Condition of Right of Way—Continued.

In an action for damages by fire, the exclusion of testimony offered by the plaintiff, that the defendant's right of way was not clear and free of combustible material at a point a mile from where the fire occurred, was not erroneous, although the officer of defendant testified that the right of way of defendant had been raked and burned shortly before the fire, from which it might naturally be inferred that the entire right of way had been raked and burned shortly before the fire, whereas the testimony of the witness offered showed that it had not been raked and burned throughout its entire length. The evidence offered was immaterial as tending to show what the condition of the track was at the point at which the fire originated. Abernathy *v.* Emporia Mfg. Co., 406.

Engine Throwing Out Sparks.—In an action for damages by plaintiff for the destruction of his property by fire alleged to have been set out by sparks or coals dropped or thrown from one of the locomotive engines or trains of defendant, it was prejudicial error to refuse to allow the plaintiff, on examination in chief as a witness in his own behalf, to answer the following question: "State whether or not engines of the defendant * * * drawing freight trains southward * * * throw sparks and coals as they pass the point at which your property is located." Torbert *v.* Atlantic Coast Line R. Co., 682.

In the instant case the undisputed fact was, that the train of the defendant, from which plaintiff's evidence tended to show the fire originated, passed along by a shed between lines of box cars standing on each side of the main line track, which of itself, according to known physical laws, in the resistance given by such lines of box cars to the air displaced by the defendant's moving train, might have caused ample disturbance of the air to have carried sparks or coals, if thrown out by the engine of such train, the short distance of twenty-five feet from the engine to the debris on the side of the shed, where the fire originated according to the testimony for the plaintiff. Therefore, whether or not such engine in fact threw sparks and coals as it passed said locality was a material fact in the instant case, upon the plaintiff's theory of the origin of the fire. Hence, the error in excluding the circumstantial evidence referred to in the preceding headnote was plainly harmful error to the plaintiff and therefore reversible error. Torbert *v.* Atlantic Coast Line R. Co., 682.

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FIRES—Continued.

Evidence.—See *infra*, "Condition of Right of Way;" "Engine Throwing Out Sparks;" "Presumptions and Burden of Proof;" "Weight of Evidence."

In an action for damages by fire, if the fire could only have been set out by one of two engines and one of these was eliminated entirely, then the evidence relating to fires set out by the eliminated engine was not proper for the consideration of the jury. Abernathy *v.* Emporia Mfg. Co., 406.

Evidence as to Other Fires.—*General Rule.*—In an action against a railroad for damages by fire, since the Featherston act, Acts of Assembly, 1908, p. 388, it is not error to admit evidence for the plaintiff that other engines of the railroad company at other times in the past had thrown out sparks and cinders and in some cases had set out fires at and near the locality of the buildings of the plaintiff, for damages for the burning of which the action was brought. Prior to the Featherston act, the ultimate question of fact in issue in railroad fire damage cases was whether the fire was *negligently set out* by the railroad company. Since the Featherston act the issue in such cases does not include negligence as an essential ingredient. Such ingredient consists only of the existence of the fact of the setting out of the fire by the railroad company by sparks or coals (cinders) dropped or thrown from some one or more of its engines, and that, under such act, is the ultimate fact in issue; and all evidence, whether circumstantial or direct, which tends to prove that issue is admissible. Norfolk & W. R. Co. *v.* Spates, 69.

In the instant case, at least one witness for the plaintiff testified that engine number eleven as well as engine number twelve had passed the place where the fire originated shortly before it broke out. It was, therefore, competent for the plaintiff to show the bad condition of engine number eleven soon after the fire, and the exclusion of evidence that engine number eleven had been seen to set out a fire shortly after the fire in question was erroneous. Abernathy *v.* Emporia Mfg. Co., 406.

Remarks of Court on Evidence.—It was not error in the trial court in its ruling as to the admissibility of evidence of sparks and cinders being thrown out and fires started at other times, to remark that: "I think it admissible but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other occasions and therefore that it is *possible* for it to have thrown out fire at this time." The objection of the defendant to the ruling was the use of the

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FIRES—Continued.

Evidence as to Other Fires—Continued.

Remarks of Court on Evidence—Continued.

word "possible" instead of the word "liable," as the court used in later rulings on the same question, but it was considered that in this connection the word "possible" was more favorable to the defendant than the word "liable." Moreover, in view of the admittedly correct instruction given by the trial court on this point, it does not affirmatively appear from the record that the jury was misled by this ruling or would or could, in accordance with the evidence, have rendered a different verdict from what they did, and hence the error in such ruling, if there was one, was harmless. Norfolk & W. R. Co. *v.* Spates, 69.

Weight of Evidence.—Evidence that on other occasions the engines of defendant company had thrown out sparks and cinders and in some cases had set out fires at and near the locality of the fire about which action was brought, was not conclusive evidence in itself, but admissible to be weighed and considered by the jury in connection with all the other evidence in the case. Norfolk & W. R. Co. *v.* Spates, 69.

Evidence in Possession of Defendant.—In an action against a railroad company for damages from fire set out by an engine of the company, there was no direct evidence that any engine of any train of defendant passed the point where the fire originated shortly before the fire. The evidence for the plaintiff on this point was wholly circumstantial. It consisted in proving that a mail train of the defendant was, by its schedule of trains, due to pass along by such point at such time. Held: That in view of the fact that definite evidence of the exact time at which the train passed was peculiarly within the possession of the defendant, being furnished by its record of the movement of its trains, the testimony for plaintiff furnished *prima facie* evidence of the fact that the train ran on time on the day in question, and hence passed the point of origin of the fire a short time before the fire originated. The defendant having failed to introduce any evidence to rebut the *prima facie* proof aforesaid, such proof became conclusive of the fact in question. Ches. & O. R. Co. *v.* Ware, 246.

Inference from a Presumption.—See PRESUMPTIONS AND BURDEN OF PROOF.

In an action for damages by fire, the court instructed the jury "that in order to warrant a verdict against the defendant, the evidence must show more than a probability of a

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FIRES—Continued.

Inference from a Presumption—Continued.

negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established." Held: That the instruction was not erroneous, while the statement in the instruction, that an inference cannot be drawn from a presumption, but must be founded upon some fact legally established, could not have been very helpful to the jury, yet in view of other instructions given in the case it could not have led them astray. Abernathy *v.* Emporia Mfg. Co., 406.

Instructions.—See *infra*, "Presumptions and Burden of Proof;" "Weight of Evidence."

It was not error in the trial court in its ruling as to the admissibility of evidence of sparks and cinders being thrown out and fires started at other times, to remark that: "I think it admissible but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other occasions and therefore that it is *possible* for it to have thrown out fire at this time." The objection of the defendant to the ruling was the use of the word "possible" instead of the word "liable," as the court used in later rulings on the same question, but it was considered that in this connection the word "possible" was more favorable to the defendant than the word "liable." Moreover in view of the admittedly correct instruction given by the trial court on this point, it does not affirmatively appear from the record that the jury was misled by this ruling or would or could, in accordance with the evidence, have rendered a different verdict from what they did, and hence the error in such ruling, if there was one, was harmless. Norfolk & W. R. Co. *v.* Spates, 69.

In an action against a railroad for damages by fire, the following instruction, "The court further instructs the jury that the burden of proof is upon the plaintiff to show by clear and affirmative testimony that the defendant set out the fire, the court telling the jury that it is not sufficient for the plaintiff to show that it was possible for the defendant to have started the fire but it must appear from the evidence that there was no other probable cause for the fire," is not contradictory in terms, or calculated to mislead the jury into believing therefrom that it was instructed that the railroad company was liable, unless it appeared from the evidence that there was no other probable cause for the fire, when taken in connection with another instruction, "that before the plaintiff can recover in this case the evidence

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FIRES—Continued.

Instructions—Continued.

must be such as to show more than a mere probability that the property was destroyed by sparks of fire or cinders set out by an engine of defendant company." Norfolk & W. R. Co. *v.* Spates, 69.

In an action for damages the jury were instructed that if they "believe from the evidence that the fire in question originated on the right of way of the defendant by the emission of sparks or coals of fire, yet if they believe from the evidence that said right of way was reasonably clear of combustible materials liable to ignition, then the defendant is not liable," is erroneous. The instruction should have gone further and said, that if the right of way was reasonably clear of combustible material, and the defendant's locomotives were equipped with the best appliances in known practical use, that they were in good order and carefully operated, then and in that event they should find for the defendant. Abernathy *v.* Emporia Mfg. Co., 406.

It is not error to refuse an instruction (although the proposition of law enunciated is correct) that the jury cannot "presume from the happening of the fire that it was caused by the defendant company's engine or engines," where it did not appear that the jury were asked to apply such a presumption, but, on the contrary, other instructions clearly instructed them as to the law which negatived any such presumption. Moreover the instant case was not one in which the plaintiff was left by the evidence to rely upon such a presumption. She had other evidence in her behalf on the point. Hence the giving of such an instruction in such a case would have been confusing and misleading to the jury. Norfolk & W. R. Co. *v.* Spates, 69.

Where the evidence showed that the fire could only have arisen from causes for which defendant railroad was responsible and liable in damages under the Featherston act, it was not error to refuse an instruction that if the jury believed that the fire might have resulted from one of two causes, for one of which defendant was responsible, but not for the other, the plaintiff could not recover, nor could the plaintiff recover if it was just as probable that the fire was caused by the one as by the other cause. Norfolk & W. R. Co. *v.* Spates, 69.

Confused and Misleading Instructions.—In an action for damages by fire an instruction was given that unless the jury believe from the evidence "that engine eleven might

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FIRES—Continued.

Instructions—Continued.

Confused and Misleading Instructions—Continued.

have caused the fire complained of, they should not consider any evidence relative to fires testified to have been set out by engine eleven nor the evidence relative to what is known as 'second fire,' or the fire west of Woods Camp, unless they believe that the engine that might have caused the fire in question might also have originated that fire." The evidence showed that but two engines, numbers eleven and twelve, had run on the railroad the day of the fire and the evidence for the defendant clearly showed that engine number eleven could not have set out the fire. But there was some evidence on the part of the plaintiff that number eleven as well as number twelve might have set out the fire. Held: That the instruction was not erroneous as incoherent and as combining two distinct charges with reference to two severable questions which were so inextricably blended as to be utterly misleading and confusing to the jury. Abernathy *v.* Emporia Mfg. Co., 406.

Not Based upon the Evidence.—In an action for damages by fire, where the defendant offered evidence to support its theory that it was not responsible for the origin of the fire, and evidence was introduced to the effect that two boys smoking cigarettes were seen going in the direction in which the fire originated at a propitious time for the fire to have been set out through their negligence, the instruction set out in the preceding headnote is not erroneous as taking a partial view of the evidence and as being based upon a mere scintilla of evidence. Abernathy *v.* Emporia Mfg. Co., 406.

Where Fire Might Have Originated from Two Causes.—In an action for damages by fire the jury were instructed that not "only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the fire may have been started from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the fire was caused by the one as by the other;" that is to say, that if the jury believe that the fire might have been set out by the boys who were smoking cigarettes, as well as by sparks from the engine of the defendant, or if it was just as probable that the fire was caused by the one as by the other, they should find for the defendant. Held: That an objection to this instruction

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FIRES—Continued.

Instructions—Continued.

Where Fire Might Have Originated from Two Causes—Continued.

that it consisted of many incongruous, unrelated and contradictory propositions bound up together, could not be sustained. Abernathy *v.* Emporia Mfg. Co., 406.

Liability of Railroad.—A railroad is liable under the Featherston act for a fire orginating in any of the following ways: (a) From coals, or cinders, dropped from an engine and thrown by the wheels on trash and dry vegetable matter on the right of way of the railroad company, from which the fire burned over the ground and communicated and set fire to plaintiff's property. (b) From sparks thrown from an engine on trash and vegetable matter on the right of way of defendant railroad, from which the fire burned over the ground and communicated and set fire to plaintiff's property. (c) From sparks thrown from an engine, beyond defendant railroad's right of way on to plaintiff's property. Norfolk & W. R. Co. *v.* Spates, 69.

Negligence.—See *infra*, "Allegation of Negligence."

Other Fires.—See *infra*, "Evidence of Other Fires."

Pleading.—See *infra*. "Allegation of Negligence."

Presumption Based upon Presumption.—See CIRCUMSTANTIAL EVIDENCE.

Presumptions and Burden of Proof.—See *infra*, "Inference from a Presumption."

In an action for damages by fire an instruction that the burden is on the plaintiff to show by a preponderance of evidence how and why the fire occurred and to warrant a verdict for the plaintiff the final burden rests upon him to prove by a preponderance of evidence that the origin of said fire was due to the negligence of the defendant, is not erroneous and is not calculated to convey to the jury the idea that the plaintiff is required to prove his case beyond a reasonable doubt. When the instruction is read as a whole, it did no more than tell the jury that the burden was upon the plaintiff, by a preponderance of the evidence, to establish the fact that the fire in question was set out by the defendant, or to trace the origin of the fire to the defendant's agency. The object of the instruction was to tell the jury that they could not guess at the origin of the fire, but that this fact must be established by evidence, and that, in order to fix a liability on the defendant by finding a verdict in his favor against the defendant, the burden was

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FIRES—Continued.

Presumptions and Burden of Proof—Continued.

upon the plaintiff to show, by a *preponderance* of the evidence, "that the origin of said fire was due to the negligence of the defendant." Abernathy *v.* Emporia Mfg. Co., 406.

Res inter Alios Acta.—See *infra*, "Evidence as to Other Fires."

Weight of Evidence.—In an action for damages by fire alleged to have been set out by a railroad, an instruction that the jury could not "presume from the happening of the fire that it was caused by the defendant. * * * In other words, it is incumbent upon the plaintiff to show how the fire occurred and the plaintiff cannot leave to the jury the determination of the question by conjecture, guess or random judgment or upon mere supposition," is erroneous. It is in effect an instruction to the jury that they could not, in the instant case, presume (*i. e.*, could not draw the inference of fact) from the happening of the fire, under the circumstances shown by the evidence for the plaintiff, that it was caused by the defendant. That was precisely such an inference of fact as the jury might have been warranted in drawing in the instant case, in view of the undisputed facts and of the evidence for the plaintiff. Torbert *v.* Atlantic Coast Line R. Co., 682.

FOREIGN CORPORATIONS.

Jurisdiction.—The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over him, if he is found and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance. Bank of Bristol *v.* Ashworth, 170.

Plea to the Jurisdiction.— See ABATEMENT, REVIVAL AND SURVIVAL.

Service of Process.—The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over him, if he is found and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance. Bank of Bristol *v.* Ashworth, 170.

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FORMER ADJUDICATION OR RES ADJUDICATA. See "Law of the Case."

When Question of Res Judicata Does Not Arise.—Plaintiffs' bill of exception stated that after the introduction of certain evidence, the plaintiff moved to be exonerated from the payment of the taxes in question on the ground that the court had already passed upon the question at issue in a controversy about the taxes of a previous year and had ascertained and determined that the trust funds upon which the taxes were levied "were not subject to taxation in Virginia and that the question then presented was *res judicata*, but the court overruled the motion and refused the relief sought." Held: That the record did not sustain the contention, that the liability of the trust fund for the taxes of the previous year was passed upon directly or indirectly in the former proceedings, and therefore no question of *res judicata* could arise in the present proceedings. Wise and Others *v.* Commonwealth, 693.

FRANCHISE. See MUNICIPAL CORPORATIONS.

FRAUD AND DECEIT. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

Contracts.— See *infra*, "Rescission."

Partnership.—See PARTNERSHIP.

Rescission.—Fraud does not render contracts and other transactions absolutely void but merely voidable, so that they may be either affirmed or repudiated by the party who has suffered the wrong. If he elects to repudiate and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position as though the transaction had not taken place and by doing equity to the defendant as well as to the plaintiff. Gathright *v.* Fulton, 17.

FRAUDS, STATUTE OF.

Promise to Answer for Debt of Another.—In the case at bar, the alleged promise or promises by the individual stockholders to pay the debt of the corporation was or were collateral and not original, and under the statute of frauds (Code of 1904, section 2840), no action can be brought upon a promise to pay the debt of another unless the promise be in writing signed by the party to be charged thereby or his agent. The plaintiff did not release the corporation, the original debtor,

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FRAUDS, STATUTE OF—Continued.

Promise to Answer for Debt of Another—Continued.

from its obligation, nor did she release or waive any of her legal rights to subject the assets of the corporation to her debt, nor was she asked to do so, and the case is clearly within the letter and reason of the statute. Friedlin *v.* Crockin, 521.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

Husband and Wife.—See *infra*, "Proof of Fraud."

Code, Sections 2458 *and* 2459.—Code of 1904, section 2459, provides that conveyances which are not upon consideration deemed valuable in law, or which are upon consideration of marriage, shall be void as to existing but not as to subsequent creditors. Section 2458 provides that every conveyance given with intent to delay, hinder or defraud creditors, shall be void. A husband conveyed to his wife all his real estate, reciting the consideration to be the sum of five dollars and other valuable considerations. The husband was engaged in business, and at the time of the conveyance was indebted to others, and at the time of his death his indebtedness had increased. Upon suit by the husband's creditors to set aside the deed as fraudulent the wife contended that the conveyance was voluntary and not based upon valuable consideration, and that therefore the conveyance was not void as to subsequent creditors. Held: That the burden of proof was upon the wife and that the false and deceptive recital of a valuable consideration in the deed did not shift the burden of proof to creditors whose debts were contracted after the conveyance. Morrisette *v.* Cook & Bernheimer Co., 588.

False Recital a Valuable Consideration.—In a suit properly instituted by subsequent creditors, it appeared that a husband, indebted at the time, conveyed the major portion of his property to his wife, by a deed which falsely recited a valuable consideration, the amount of which was not disclosed by the deed, and which was in fact voluntary. Held: That in the absence of satisfactory explanation, such facts are sufficient to sustain a decree that the conveyance was fraudulent and hence void as to subsequent creditors. Morrisette *v.* Cook & Bernheimer Co., 588.

Presumption of Fraud.—As a matter of public policy, conveyances by husband to wife, where the husband is indebted, are presumed to be fraudulent, because of the temptation to commit frauds upon creditors and the ease with which they may be perpetrated, and this presumption must be overcome by evidence. Where a husband who is indebted

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FRAUDULENT AND VOLUNTARY CONVEYANCES—Continued.

Husband and Wife—Continued.

Presumption of Fraud—Continued.

conveys his property to his wife, the wife must prove the good faith of the transaction by clear and satisfactory evidence. If the deed be tainted with actual fraud, it is void as to all creditors, whether existing or subsequent. When post nuptial settlements are assailed by creditors, they must be upheld by proof; and the answer of the wife is not evidence, but must be sustained by proper proof. Morrisette *v.* Cook & Bernheimer Co., 588.

Proof of Fraud.—See *infra*, "Husband and Wife."

A gift of a chattel being without valuable consideration is always void as to existing creditors of the donor; but as to subsequent creditors actual fraud must be proved. The voluntary character of the transaction may be one element in the proof of fraud, but not sufficient proof, because the statute says it shall not be. Morrisette *v.* Cook & Bernheimer Co., 588.

In the case at bar a husband who was indebted at the time made a conveyance to his wife, which was in fact voluntary though it falsely purported to be for a valuable consideration. The husband was engaged in a business which was to be prohibited by law within eighteen months. His fixtures and business stand were, therefore, depreciating in value, while his debts, instead of diminishing, materially increased soon after the conveyance, and the evidence submitted did not clearly and satisfactorily prove that the grantor had reserved sufficient property to pay his debts. Held: That this was not merely a voluntary conveyance under section 2459 of the Code of 1904. Morrisette *v.* Cook & Bernheimer Co., 588.

GIFTS.

Advancements.—See ADVANCEMENTS.

Charities.—See CHARITIES.

Chose in Action.—See *infra*, "Delivery."

Delivery.—Title to personal property of all kinds may be passed by gifts, and, when so passed, it is as irrevocable as if passed by purchase; but in order to possess this quality the gift must be complete. The thing given must be delivered, else the gift is incomplete. An agreement for future delivery is nothing more than a promise to make a gift. The delivery, however, may be actual, constructive or symboli-

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GIFTS—Continued.

Delivery—Continued.

cal, depending upon the nature of the thing given. But there must be delivery of some kind, else there is no gift, unless it be by way of declaration of a trust. Gardner *v.* Moore's Adm'r, 10.

Where an alleged gift by a mother to her daughter, with whom she resided, was not of money, but was a part of a judgment which the donor had recovered against her son—a mere chose in action—the provision of section 2414 of the Code of 1904, relating to the residence together of the donor and donee at their place of residence, has no application thereto. Gardner *v.* Moore's Adm'r, 10.

Effect of in General.—Gardner *v.* Moore's Adm'r, 10.

Income.—See ESTATES.

Judgment.—See *infra*, "Delivery."

Requisites.—See *infra*, "Delivery."

GUARANTY.

Del Credere Guaranty.—See FACTORS AND COMMISSION MERCHANTS.

HABEAS CORPUS.

Reformatories.—If substantially the proceedings prescribed by chapter 350, Acts 1914, page 696, had been followed in the instant case, and if notice thereof had been given to the petitioner, the father of the children, the lower court would have had jurisdiction to proceed with the case and to have entered the order committing the children to the custody of the Children's Home Society of Virginia, and although there might have been error therein, such error could not have been inquired into or reviewed by the Supreme Court of Appeals in a proceeding by application for a writ of *habeas corpus*, but only by appeal from such order. Ex-Parte Mallory, 298.

HARMLESS ERROR. See APPEAL AND ERROR.

HEARSAY EVIDENCE.

Cruelty to Children.—See CRUELTY TO CHILDREN.

Libel and Slander.—See LIBEL AND SLANDER.

HOMICIDE.

Dying Declarations.—See DYING DECLARATIONS.

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HOMICIDE—Continued.

Evidence.—*Instructions Must Be Based on Evidence.*—See *infra*, "Instructions."

Indictment and Information.—*Description of Bullets.*—An indictment for murder alleged that the killing was done with a loaded shot-gun and that the shot-gun was loaded with gunpowder and leaden "shots or bullets." It was contended that the missiles used in loading the shot-gun with which the homicide was committed should have been described conjunctively. Held: That there was no force in this contention, as the statute provides, that "all allegations unnecessary to be proved may be omitted in any indictment or other accusation" (Code 1904, section 3998); and omissions from indictments "of any particular kind of force and arms; * * * or the omission or insertion of any other words of mere form or surplusage," will not vitiate an indictment. (Code 1904, section 3999). In this indictment, the words "shots" and "bullets" were not used disjunctively or alternatively, but synonymously or interchangeably; and, hence they introduce no element of uncertainty in the allegation even if the words were regarded as material. An averment that the killing was done with a loaded shot-gun would have been quite sufficient, without specifying the kind of missiles employed. Green *v.* Commonwealth, 862.

Instructions.—*Justifiable Homicide.*—See *infra*, "Justifiable Homicide."

Must Be Based on Evidence.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, and the evidence, both for the Commonwealth and the accused, showed the existence of great provocation, namely, that when the fatal shot was fired the deceased was violently choking the mother of the accused, instructions that to sustain provocation as a defense to murder in the first degree, it must be shown that the prisoner, at the time of the fatal shooting, was deprived of the power of self-control by the provocation which he received, and that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie* willful, deliberate, and premeditated killing, were calculated to confuse and mislead the jury, and ought not to have been given. Green *v.* Commonwealth, 862.

Threats.—See *infra*, "Threats."

Justifiable Homicide.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction, which was ap-

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HOMICIDE—Continued.

Justifiable Homicide—Continued.

plicable under defendant's theory of the case: "The court instructs the jury that justifiable homicide is the killing of a human being in the necessary, or apparently necessary, defense of one's self or family from great bodily harm, apparently attempted to be committed by force, or in defense of home, property or person, against one who apparently endeavors by violence or surprise to commit a felony on either." Green *v.* Commonwealth, 862.

Self-Defense.—See *infra*, "Justifiable Homicide."

Threats.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction: "The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned." Green *v.* Commonwealth, 862.

HOSPITALS.

Charities.—See CHARITIES.

The establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a benevolent object of a public character; this is manifest from sections 1719 and 1720 of the Code of 1904, authorizing such hospitals and their maintenance out of the public funds; and the maintenance of the indigent poor is also a benevolent or charitable object of a public character. Pirkey *v.* Grubb's Ex'or, 91.

HOUSE OF REFUGE. See REFORMATORIES.

HUSBAND AND WIFE.

Fraudulent and Voluntary Conveyances.—See FRAUDULENT AND VOLUNTARY CONVEYANCES.

HYPOTHETICAL QUESTIONS. See EXPERT AND OPINION EVIDENCE.

IMPLIED CONTRACTS. See CONNECTING CARRIERS.

IMPROVEMENTS.

Mortgages and Deeds of Trust.—Code of 1904, section 2760, allowing recovery for improvements restricts such recovery to one "holding the premises under a title believed by him

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IMPROVEMENTS—Continued.

Mortgages and Deeds of Trust—Continued.

* * * to be good." This section has no application to one who is not a *bona fide* purchaser, and a person with notice, actual or constructive, or infirmity in his title cannot recover for improvements. Smith *v.* Woodward, 356.

Where suit is brought to set aside a trustee's sale under a deed of trust within about forty days after the date of the sale, and thirty days after the purchaser obtained his deed, the grantor is not chargeable with negligence in bringing his suit, and of standing by and seeing the purchaser put valuable improvements on the place without making known his objections. Smith *v.* Woodward, 356.

INDICTMENT AND INFORMATION.

Alleging Constituents of Offense.—All the constituents of the offense, whether of common law or statutory origin, for which an accused person is tried, must be set out in the indictment. This general principle necessarily applies where malice is an essential ingredient of the offense. Hummer *v.* Commonwealth, 826.

Defendants were indicted upon the charge of having "unlawfully and feloniously" cut and wounded another. The indictments contained no charge of "malicious" cutting. After the prisoners had been arraigned and had each entered a plea of not guilty, the clerk read the indictment to the jury, and, in charging them as to the punishment for the alleged offense, read to them, over the objection of counsel, section 3671 of the Code of 1904. This section provides that if any person *maliciously* cuts or wounds another, with intent to maim, disfigure, disable or kill, he shall be punished by confinement in the penitentiary not less than one nor more than ten years. But if the act be done unlawfully, but *not maliciously*, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars. The court also refused an instruction requested by counsel for defendants that under the indictment defendants could not be found guilty of *maliciously* cutting or stabbing. Held: That the court erred in permitting the clerk to read to the jury section 3671 without explaining to them that they were not to regard that portion of it which related to the punishment for maliciously doing the acts therein described; and, further, that it was error, in these circumstances, to refuse the instruction requested. Hummer *v.* Commonwealth, 826.

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INDICTMENT AND INFORMATION—Continued.

Bill of Particulars.—The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. Wilkerson *v.* Commonwealth, 920.

Conclusion against the Peace and Dignity of the Commonwealth.—Constitution of 1902, section 106, provides that: "Indictments shall conclude 'against the peace and dignity of the Commonwealth.'" An indictment which concludes "against the peace and dignity of the Commonwealth of Virginia" does not violate this provision. The added words "of Virginia" were plainly surplusage. Webb *v.* Commonwealth, 899.

Conclusions of Law,—See *infra*, "Legal Conclusions."

Counts.— See *infra*, "Election between Counts."

Demurrer.—Where every fact charged in an indictment may be true and yet the accused be guilty of no offense, the indictment is bad on demurrer. Blair *v.* Commonwealth, 798.

Election between Counts.—The first count of an indictment for larceny charged the accused with the larceny of a check for $76.70, alleged to be the property of V., who was the payee of such check; the second count charged the larceny of that amount of money belonging to the said V.; and the last two counts were identical with the first two, except that the check, which was drawn by an insurance company, as well as the money, were alleged to be the property of that company. The accused asked the court to require the Commonwealth to elect on which count of the indictment it would ask for a conviction. It appeared from the Commonwealth's evidence that there was in reality a single connected transaction, commencing with the change in the policy on the life of C., induced by the accused, so as to make the benefit payable to V., followed some fifteen months later by the death of the assured, the making out of the claim for the insurance in the name of V. by the accused, and the receipt by him of the check payable to V., its endorsement by him in the name of V., and his collection and appropriation of a large part of the money. All of the evidence submitted was pertinent to this alleged sequence of facts, and each of these facts had relation to all of the others. Held: That the court properly refused to require the Commonwealth to elect. Allen *v.* Commonwealth, 834.

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INDICTMENT AND INFORMATION—Continued.

Election between Counts—Continued.

Compelling of an election pertains not to absolute law but to judicial discretion. Ordinarily, therefore, the decision of the presiding judge, granting or refusing it, is not open to revision by the higher tribunal. Allen *v.* Commonwealth, 834.

Homicide.—See HOMICIDE.

Insufficiency of Indictment.—See *infra*, "Demurrer."

When the indictment may be true, and yet the defendant is not necessarily guilty of the offense charged, it is insufficient. Kennan *v.* Commonwealth, 831.

Where every fact charged in an indictment may be true and yet the accused be guilty of no offense, the indictment is bad on demurrer. Blair *v.* Commonwealth, 798.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Joinder of Offenses.—See LARCENY.

Distinct felonies may be charged in different counts in the same indictment, and the same felony may be charged in different ways in several counts, so as to conform to the evidence as it may develop at the trial. Allen *v.* Commonwealth, 834.

Where in cases of felony several offenses are charged, in sundry counts of the same indictment, if the court sees that the charges are so distinct that to try them together would confound the prisoner, or distract the attention of the jury, it will require the Commonwealth's attorney to select which count he will try first. Allen *v.* Commonwealth, 834.

Larceny.—See LARCENY.

Legal Conclusions.—Whether an act is lawful or unlawful is a question of law and not of fact, and it is the province of an indictment to state facts and not conclusions of law. Blair *v.* Commonwealth, 798.

Malice.—See *infra*. "Alleging Constituents of Offense."

Negativing Exceptions.—Where exceptions are created by other sections of an act than that under which an offense is charged in an indictment, the indictment need not negative and exclude by its allegations the possibility of the act of the accused charged thereby coming within any of such exceptions. Cochran *v.* Commonwealth, 801.

Several Offenses Charged in Different Counts.—See *infra*, "Joinder of Offenses."

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INFANTS.

Commitment of Minors.—See REFORMATORIES.

Chapter 289, Acts 1910, page 434, in regard to the commitment of minors, is repealed by implication by chapter 350, Acts 1914, page 696. Ex-Parte Mallory, 298.

Criminal Law.—See CRIMINAL LAW.

Cruelty to Children.—See CRUELTY TO CHILDREN.

Custody of Children.—See REFORMATORIES.

INFORMATION. See INDICTMENT AND INFORMATION.

INJUNCTION.

Taxation.—Jurisdiction of equity to restrain an illegal or unauthorized tax. Commonwealth *v.* Tredegar Co., 506.

INSPECTION. See MASTER AND SERVANT.

INSTRUCTIONS.

Appeal and Error.—See APPEAL AND ERROR.

A defect in one instruction is not cured by a correct statement of the law in another, where the appellate court is unable to say that the jury could not have been misled by the defective instruction. Abernathy *v.* Emporia Mfg. Co., 406.

Application to a Particular Fact.—An instruction as given contained a full statement of the law applicable to a certain phase of the case. As it was the duty of the jury to apply the law thus stated to the facts, it was unnecessary to go further and say to them that the law, in addition to its general application, was also applicable to some particular fact. Va. Portland Cement Co. *v.* Swisher, 123.

Certification of Instructions.—See APPEAL AND ERROR.

Confused and Misleading Instructions.—See FIRES.

Contributory Negligence.—In an action for personal injuries sustained at a grade crossing, the court instructed the jury that the burden of proving contributory negligence was upon the defendant. This was erroneous, as the instruction should have concluded, "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances," or with language of similar import. Norfolk So. R. Co. *v.* Smith, 302.

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INSTRUCTIONS—Continued.

Curative Effect of Instructions.—A defect in one instruction is not cured by a correct statement of the law in another, where the appellate court is unable to say that the jury could not have been misled by the defective instruction. Abernathy *v.* Emporia Mfg. Co., 406.

Duty to Instruct.—See *infra*, "Modification of or Substitution of Instructions."

Eminent Domain.—See EMINENT DOMAIN.

Evidence.—*Striking out Evidence.*—See EVIDENCE.

Evidence to Support.—Where the evidence showed that the fire could only have arisen from causes for which defendant railroad was responsible and liable in damages under the Featherston act, it was not error to refuse an instruction that if the jury believed that the fire might have resulted from one of two causes, for one of which defendant was responsible, but not for the other, the plaintiff could not recover, nor could the plaintiff recover if it was just as probable that the fire was caused by the one as by the other cause. Norfolk & W. R. Co. *v.* Spates, 69.

Fires.—See FIRES.

Homicide.—See HOMICIDE.

Instructions Already Given.—See *infra*, "Repetition of Restructions."

Instructions Read Together.—See MASTER AND SERVANT.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Invited Error.—See APPEAL AND ERROR.

Where accused in a requested instruction introduced unnecessary matter not essential to the defense relied on and with reference to which the Commonwealth had introduced no evidence, he cannot complain that the court inadvertently allowed it to remain therein. Lucchesi *v.* Commonwealth, 872.

Language Used in Opinion.—Language used by an appellate court in deciding a case may be entirely proper and correctly state the law, and yet be wholly unsuitable as an instruction to the jury, even where the facts of the two cases are similar. The appellate judge frequently uses argumentative language and also freely expresses his opinion upon the facts of the case, neither of which would be appropriate in an instruction to the jury. So that the mere fact that certain language has been used by the judge of the appellate court in

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INSTRUCTIONS—Continued.

Language Used in Opinion—Continued.

rendering an opinion is not of itself sufficient to justify the use of the same language by a trial court in its instruction to the jury. Abernathy *v.* Emporia Mfg. Co., 406.

Last Clear Chance.—See LAST CLEAR CHANCE.

Libel and Slander.—See LIBEL AND SLANDER.

Modification of or Substitution of Instructions.—Although an instruction requested by defendant was correct as a statement of abstract legal propositions, and the court would not have erred in giving it, there was no reversible error in the substitution of another instruction which was a clear, correct and adequate statement of the law from the defendant's standpoint as applied to the facts of the case in hand. Fitzgerald *v.* So. Farm Agency, 264.

Multiplicity of Instructions.—See *infra*, "Repetition of Instructions."

Must Be Based on Evidence.—It is not error to refuse an instruction where the evidence does not sustain it. Va. Portland Cement Co. *v.* Swisher, 123.

Instructions which propound correct general propositions of criminal law, but are not applicable under the evidence adduced in the case, are calculated to confuse and mislead the jury, and ought not to be given. Green *v.* Commonwealth, 862.

Homicide.—See HOMICIDE.

Opinion.—See *infra*, "Language used in Opinion."

Presumption of Innocence.—On a trial under the prohibition act, the following instruction was asked for and refused: "The court instructs the jury that the accused is presumed to be innocent." Held: No error, as it in effect announced a conclusion of the court, that notwithstanding the evidence in the case the accused was still presumed to be innocent. The correct rule on the subject is that the accused is presumed to be innocent until his guilt is established by the evidence. Cochran *v.* Commonwealth, 801.

Read as a Whole.—Instructions must be read as a whole. Webb *v.* Commonwealth, 899.

Accused was charged with the larceny of a horse. Upon the question of the intent of the accused in taking the horse the trial court, at the request of the Commonwealth, instructed the jury "that in criminal cases a man on trial is presumed to have intended that which is the necessary consequence of his act, and that the jury are the judges of the

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INSTRUCTIONS—Continued.

Read as a Whole—Continued.

evidence and can draw such deductions from the entire evidence as in their judgment should be drawn therefrom and act on same in finding their verdict." The court also instructed, at the request of the accused, "that the burden of proof is on the Commonwealth to prove beyond all reasonable doubt each and every allegation of the indictment, and if the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offense, they are bound to give the accused the benefit of that doubt," and, "that the intent of the accused at the time of the taking of the horse in the indictment mentioned is a material fact in this case, and that before they can convict him of the offense charged they must be convinced beyond all reasonable doubt that at the time he took it, he took it intending wholly to deprive the owner of this horse and without an intention to return it." In substance, the instruction given at the request of the Commonwealth has been repeatedly applied, and in the case at bar, as qualified by the other instructions, could not have misled the jury. Webb *v.* Commonwealth, 899.

Reasonable Doubt.—See REASONABLE DOUBT.

Repetition of Instructions.—The practice of diminishing instead of multiplying instructions unnecessarily is rather to be commended than condemned. Norfolk & W. R. Co. *v.* Spates, 69.

The principle that when an instruction prepared by counsel for either party states a correct principle of law, then the party offering it is entitled to have it given in the language employed in it, is subject to the well-settled qualification that when the jury have been fully and sufficiently instructed on a given point or points in a case, it is not error to refuse other instructions, though correct, on the same point or points. Norfolk & W. R. Co. *v.* Spates, 69.

The failure of the trial court to give certain instructions at the request of the accused, which fairly and properly stated propositions of law upon which the accused had a right to rely, was not error, where these propositions were fully covered by instructions given at the instance of the Commonwealth, though the rejected instructions expressed these statements of law with greater emphasis. It is objectionable to multiply instructions which repeat the same propositions of law in different terms; therefore, it is not error to select between the two sets of instructions equally

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INSTRUCTIONS—Continued.

Repetition of Instructions—Continued.

unobjectionable and to refuse to multiply instructions substantially the same in legal effect. Bare *v.* Commonwealth, 783.

There is no error in refusing an instruction where the jury had already been sufficiently instructed on the subject, and almost in the very language of the instruction requested. Abernathy *v.* Emporia Mfg. Co., 406.

Where instructions given by the court at the instance of accused and the Commonwealth, fully and fairly presented every question involved in the case, the court rightly refused to add other instructions offered by the accused, the tendency of which would only have been to confuse and mislead the jury. Allen *v.* Commonwealth, 834.

Striking Out Evidence.—See EVIDENCE.

Substitution of Instructions.—See *infra*, "Modification of or Substitution of Instructions."

Threats.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction: "The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned." Green *v.* Commonwealth, 862.

Two or More Propositions of Law.—Two or more correct propositions of law may be stated in the same instruction, if the jury will not be confused thereby. Abernathy *v.* Emporia Mfg. Co., 406.

Weight of Evidence.—See LIBEL AND SLANDER.

An instruction upon the subject of the weight and effect of the evidence must be carefully drawn so as not to invade the province of the jury under our procedure. Under that procedure they are the sole judges of the credibility of witnesses and of the weight to be given to the evidence in a case. Torbert *v.* Atlantic Coast Line R. Co., 682.

In an action for damages by fire alleged to have been set out by a railroad, an instruction that the jury could not "presume from the happening of the fire that it was caused by the defendant. * * * In other words, it is incumbent upon the plaintiff to show how the fire occurred and the plaintiff cannot leave to the jury the determination of the question by conjecture, guess or random judgment or upon mere sup-

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INSTRUCTIONS—Continued.

Weight of Evidence—Continued.

position," is erroneous. It is in effect an instruction to the jury that they could not, in the instant case, presume (*i. e.*, could not draw the inference of fact) from the happening of the fire, under the circumstances shown by the evidence for the plaintiff, that it was caused by the defendant. That was precisely such an inference of fact as the jury might have been warranted in drawing in the instant case, in view of the undisputed facts and of the evidence for the plaintiff. Torbert *v.* Atlantic Coast Line R. Co., 682.

INSURANCE.

Fire Insurance.—See SALES.

Life Insurance.—See LIFE INSURANCE.

INTENT. See LARCENY.

INTERPRETATION AND CONSTRUCTION.

Statutes.—See STATUTES.

Wills.—See WILLS.

INTERSTATE COMMERCE.

State Legislation.—Since Congress has occupied the whole field of interstate commerce by virtue of the interstate commerce act and its amendments, those statutes have superseded all State legislation on the subject and they and their construction must be alone looked to in the ascertainment of the rights of parties litigant in all actions, such as that in the instant case, involving an interstate shipment. Ches. & O. R. Co. *v.* National Bk., 471.

Connecting Carriers.—See CONNECTING CARRIERS.

Corporation Commission.—See CORPORATIONS.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Tariff Regulation.—See CONNECTING CARRIERS.

Telegraphs and Telephones.—See TELEGRAPHS AND TELEPHONES.

INTOXICATING LIQUORS.

Affidavits of Accused.—By the prohibition act (Acts 1916, page 215), the affidavits of the accused filed with the express company are made *prima facie* evidence, and they are evidence, independent of statute, as to all facts which they tend to

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INTOXICATING LIQUORS—Continued.

Affidavits of Accused—Continued.

prove which are material in the case, including the *corpus delicti*, although in the absence of corroborative evidence they would be insufficient to establish it. The express records, however, are such corroborative evidence. Cochran *v.* Commonwealth, 801.

Affidavits of accused, when receipting for liquor from an express company, were admissible in evidence under the rules applicable to the admissibility of documentary evidence, as confessions of the accused. Cochran *v.* Commonwealth, 801.

Burden of Proof.—See *infra*, "Interstate Commerce;" "Presumptions and Burden of Proof."

Chemist's Analysis—*Letter of Commissioner of Agriculture.*—The Mapp act, Acts 1916, chapter 146, section 30½, makes it the duty of the State Commissioner of Agriculture, upon the written request of the proper official, to cause an analysis to be made of any mixture supposed to contain ardent spirits, and to return to the officer making such request the certificate of the chemist making the analysis. While only the certificate of the chemist is made evidence by the statute, such certificate is not evidence unless the Commissioner of Africulture, in accordance with the statute, has caused the analysis to be made, nor unless he also returns the chemist's certificate to the officer who has in writing requested such analysis. Accordingly, the letter of the commissioner accompanying the certificate of the chemist is admissible. And in the instant case the variance between the date of the letter of transmittal from the Commissioner of Agriculture, December 5, 1916, and the date of the affidavit of the chemist, the 15th day of December, 1916, was held immaterial, although it should have been explained. Bare *v.* Commonwealth, 783.

Confessions.—Affidavits of accused, when receipting for liquor from an express company, were admissible in evidence under the rules applicable to the admissibility of documentary evidence, as confessions of the accused. Cochran *v.* Commonwealth, 801.

Constitutional Law.—See *infra*, "Indictment and Information."

The prohibition act (Acts 1916, page 215), as to the transportation of liquor, does not violate the fourteenth amendment of the Constitution of the United States, in that it discriminates between corporation carriers and individuals

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INTOXICATING LIQUORS—Continued.

Constitutional Law—Continued.

who are carriers. The provision is not intended as a discrimination in favor of corporations who are common carriers, but as a restriction equally applicable to all desirous to transport ardent spirits. All persons without discrimination are privileged to use the corporation common carriers for the transportation of certain limited quantities of liquor, and all are equally restrained, so that no discrimination exists. Lucchesi *v.* Commonwealth, 872.

The State has plenary power to prohibit the importation of ardent spirits into the State for personal use or any purpose. Lucchesi *v.* Commonwealth, 872.

In a prosecution under the prohibition act the admission of the records of the express company made by strangers to him, does not violate the constitutional right of the accused to be confronted with his accusers and witnesses. Cochran *v.* Commonwealth, 801.

Corpus Delicti.—The *corpus delicti* in a prosecution for violation of section 40 of the prohibition act (Acts 1916, page 215), was the fact that some one person received delivery of whiskey in excess of one quart in quantity within a period of one calender month as charged in the indictment; and the express record alone, showing the receipts by the accused of two quarts of liquor within the calendar month, was *prima facie* evidence of that fact, and in the absence of rebutting evidence such *prima facie* evidence became conclusive. Cochran *v.* Commonwealth, 801.

There is no merit in a contention that, in a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the record of the express company and affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved. Cochran *v.* Commonwealth, 801.

"Curtilage."—In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not. Bare *v.* Commonwealth, 783.

Documentary Evidence.—There is no merit in a contention that, in a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the record of the express company and

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INTOXICATING LIQUORS—Continued.

Documentary Evidence—Continued.

affidavits of the accused were not admissible in evidence until the *corpus delicti* was otherwise proved. Cochran *v.* Commonwealth, 801.

In a prosecution under the prohibition act the admission of the records of the express company made by strangers to him, does not violate the constitutional right of the accused to be confronted with his accusers and witnesses. Cochran *v.* Commonwealth, 801.

In a prosecution under section 40 of the prohibition act (Acts 1916, page 215), the express records, independent of statute, are admissible in evidence, when properly authenticated, as a part of the *res gestae;* and, further, under the rules of evidence provided by the act in question, the record is expressly made admissible in evidence. Cochran *v.* Commonwealth, 801.

"Dwelling."—As construed by the courts from the earliest to the latest times, the words "dwelling" or "dwelling house" have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises, generally described as "within the curtilage." Bare *v.* Commonwealth, 783.

Evidence.—See *infra,* "Affidavits of Accused;" "Corpus Delicti;" "Declarations and Admissions;" "Documentary Evidence;" "Searches and Seizures;" "Transportation."

Express Records.—See *infra,* "Documentary Evidence."

Fourteenth Amendment.—See *infra,* "Constitutional Law."

"Home"— *"Permanent Residence."*—Accused was convicted under an indictment charging him with unlawfully dispensing and giving away cider containing more than one per cent. of alcohol by volume, in violation of the prohibition act, Mapp law, Acts 1916, page 216. The trial court after instructing the jury that accused had the right to give away intoxicating liquor in his home, further told the jury that "the definition of the word home, in the sense in which that word is used in the law in this connection, cannot be extended to and does not include" an outhouse seventy-five or eighty feet from the dwelling of accused, between which and his dwelling were other small structures—as one of the witnesses says, "probably a pig pen and smoke-house"—and beyond which his barn and a small chicken house were located. Held: That the court erred in instructing the jury that the outhouse was not a part of the home of the accused. In such cases, if there be any doubt as to whether the building is a part of

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INTOXICATING LIQUORS—Continued.

"Home"— *"Permanent Residence"*—Continued.

the *bona fide* home of the accused and his family, then the question should be submitted to the jury to determine from the evidence the question of fact involved. Bare *v.* Commonwealth, 783.

As used in the Mapp act, the words "home" and "permanent residence" must be construed to mean the place of residence rather than any particular building which may be at that place. And the words "in his own home," "in his home," "at his home" and "permanent residence of the person and his family" have substantially the same meaning, namely, anywhere within the curtilage. Except as to the places expressly excluded by this and the other sections of the act, the word "home," as used in the act, includes the curtilage and entire cluster of buildings used by the family as a habitation. Bare *v.* Commonwealth, 783.

Indictment and Information.—See *infra*, "Receipt Oftener Than Once a Month;" "Time of Offense;" "Transportation—'For Use in This State'—'For Sale.'"

Cause and Nature of Offense.—An indictment for offenses under the prohibition act (Acts 1916, page 215) was in substance as follows, that the accused, "within one year next prior to the finding of this indictment, and subsequent to the first day of November, 1916, in said city of Norfolk, did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits, against the peace and dignity of the Commonwealth of Virginia." The indictment was demurred to on the grounds that it was violative of section 8, Article 1, of the Constitution of Virginia, and section 1, Article 14, of the Constitution of the United States, because, with respect to the former, it does not sufficiently inform the defendant of the cause and nature of the accusation against her; and with regard to the latter (in addition to the first ground) that a conviction under it would deprive her of her liberty and property without due process of law. Held: That the indictment was not invalid for these reasons. Wilkerson *v.* Commonwealth, 920.

Keeping for Sale.—The accused was convicted of a violation of the prohibition law, Acts 1916, chapter 146, page 215. The indictment was in the form authorized by section 7 of the act, which prescribes a form that shall be sufficient for any first offense under sections 3, 4 and 5 of the act. The Commonwealth sought and obtained a conviction under section 17 of the act, which makes it unlawful to keep ardent

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INTOXICATING LIQUORS—Continued.

Indictment and Information—Continued.

Keeping for Sale—Continued.

spirits in any quantity "in a place reputed to be a house of prostitution." Held: That this it could not do under the blanket indictment allowed by section 7. Lane *v.* Commonwealth, 916.

Negativing Exceptions.—An indictment under section 40 of the prohibition act (Acts 1916, page 215) need not negative and exclude by its allegations the possibility that the accused came within any other exceptions of the statute allowing a person to receive ardent spirits—such as the allowing one to receive the same without limit as to quantity in the home of a neighbor, by section 61—and if personally brought from without the State in a limited quantity not in excess of one quart within a period of thirty days, allowed by section 39 of the act. Cochran *v.* Commonwealth, 801.

Sufficiency of Indictment.—The first count of an indictment for violation of the prohibition act charged the accused with bringing more than one quart of ardent spirits into the State from a point without to a point within this State for use within the State; the second count charged him with unlawfully bringing into the State from a point without the State to a point within this State more than one quart of ardent spirits within a period of thirty days; and the third count with unlawfully transporting ardent spirits from one point to another within this State. Held: That this indictment was sufficient under section 39 of the prohibition act (Acts 1916, page 215). Lucchesi *v.* Commonwealth, 872.

Time of Offense.—See *infra*, "Time of Offense."

Transportation.—Under section 40 of the prohibition act (Acts 1916, chapter 146, page 215), which creates the offense for which the accused in the instant case was indicted, if the ardent spirits, the delivery of which was received and accepted by him, were brought or transported by the express company, it is immaterial whether such bringing or transportation was from without or from one point to another within the State. Whether one or the other, if the ardent spirits were transported by the express company (as in the instant case) and the other essential ingredients of the offense existed, the receipt and acceptance of the delivery of the ardent spirits constituted the offense created by the statute. That is to say, whether the ardent spirits were "brought into this State from any point without the State or * * * transported from one point to another within the State," was not of the essence, not an essential ingre-

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INTOXICATING LIQUORS—Continued.

Indictment and Information—Continued.

Transportation—Continued.

dient of the offense. Consequently, it was not necessary that any allegation with respect thereto be contained in the indictment. Cochran *v.* Commonwealth, 801.

Instructions.—*Contents of Package Received by Accused.*—In a prosecution under section 40 of the prohibition act, where the record of the express office and the affidavits of accused excluded every rational hypothesis of the innocence of the accused consistent with the evidence in the case, it is not error to refuse an instruction that the burden is upon the Commonwealth to prove beyond all reasonable doubt that the substance contained in the package delivered to the defendant was distilled spirits. Cochran *v.* Commonwealth, 801.

Presumption of Innocence.—On a trial under the prohibition act, the following instruction was asked for and refused: "The court instructs the jury that the accused is presumed to be innocent." Held: No error, as it in effect announced a conclusion of the court, that notwithstanding the evidence in the case the accused was still presumed to be innocent. The correct rule on the subject is that the accused is presumed to be innocent until his guilt is established by the evidence. Cochran *v.* Commonwealth, 801.

Interstate Commerce.—Accused was charged with transporting or bringing into the State intoxicating liquor in violation of the prohibition act. His defense was that he was engaged in interstate commerce and transporting the liquor upon a continuous journey from Washington, D. C., to a point in North Carolina. The facts relied on by the Commonwealth were admitted, and this was his only defense, which, under these circumstances, he was called upon to sustain the burden of proving. The court, at the request of accused, instructed the jury that if they believed from the evidence that the accused intended to make, and was making, a continuous journey from a point without the State through the State to another point without the State, it could not find him guilty, but amended the instruction by adding that, "when the ardent spirits in excess of one quart were found in the possession of the accused, the burden of proving the above statements as facts was thrown upon the accused." Held: That this addition by the court to the requested instruction did not, as claimed by the accused, relieve the Commonwealth of prov-

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INTOXICATING LIQUORS—Continued.

Interstate Commerce—Continued.

ing the offense charged, and was not error, although in this instruction it might be said to be surplusage. Lucchesi *v.* Commonwealth, 872.

Upon a charge of transporting or bringing into the State liquor in violation of the prohibition act, where the defense is that the transportation was interstate commerce, the jury has the right to discredit the testimony of accused, and the issue having been fairly submitted to them, their verdict will not be disturbed upon appeal. Lucchesi *v.* Commonwealth, 872.

"Keep."—The word "keep," as used in section 3 of the prohibition act, means keep for sale. So, in the instant case, in order to convict under that section it was necessary for the Commonwealth to show that the keeping was for sale, but this the Commonwealth did not do nor attempt to do. Lane *v.* Commonwealth, 916.

Keeping for Sale.—See *infra*, "Indictment and Information."

Letters.—See *infra*, "Chemist's Analysis—Letter of Commissioner of Agriculture."

"Month."—See *infra*, "Receipt Oftener Than Once a Month."

"Permanent Residence."—See *infra*, " 'Home'—'Permanent Residence.' "

Personal Use.—See *infra*, "Constitutional Law."

Possession of Liquor.—See *infra*, "Presumptions and Burden of Proof."

Presumptions and Burden of Proof.—See *infra*, "Interstate Commerce."

Possession of Liquor.—Under section 65 of the prohibition act, the possession of more than one gallon of distilled liquor in one's home is made *prima facie* evidence of a possession for the purpose of sale, but the evidence is only *prima facie* and may be rebutted. Lane *v.* Commonwealth, 916.

In the case at bar, according to the evidence for the Commonwealth, slightly more than one gallon of whiskey was found in the home of the defendant, but the defendant offered evidence to show that it was not all his, and that what did belong to him had been acquired by him for his personal use before November 1, 1916. If the jury believed this, they could not convict him of any offense charged in either section 3, 4 or 5, but the jury was deprived of the opportunity of considering this aspect of the case by the ruling of the trial

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INTOXICATING LIQUORS—Continued.

Presumptions and Burden of Proof—Continued.

Possession of Liquor—Continued.

court in the admission of evidence and by its instruction to the jury. The trial court, over the objection of the defendant, admitted evidence that the defendant's home was reputed to be a house of prostitution, and instructed the jury that "it is enough to convict if you believe from the evidence that the whiskey in evidence was the defendant's and that it was a house resorted to for the purpose of prostitution." **Held:** That the defendant might have been prejudiced by this evidence and instruction, and for that reason the judgment of conviction was reversed and a new trial awarded. Lane *v.* Commonwealth, 916.

Punishment.—Section 40 of the prohibition act creates the receipt and acceptance of delivery by transportation of ardent spirits in a quantity in excess of one quart within a period of one month a statutory offense, in addition to and different from the offenses created by the concluding sentence of such section, and the offense is punishable under section 5 of the act, and not under section 40. Cochran *v.* Commonwealth, 801.

Reasonable Doubt.—Where it appeared from the record that there was evidence in the case which tended to show that the accused did not bring the liquor in question into this State or transport it from one point to another within the State; but that another person, not indicted and absent from the State at the time of the trial, brought the liquor into the State, it was error to refuse an instruction that if there was a reasonable doubt as to which of the two committed it, "neither of the two can be convicted," the instruction being the same in effect as if it had concluded, "the accused cannot be convicted," in lieu of the language, "neither of the two can be convicted." Burton *v.* Commonwealth, 847.

In a prosecution under section 40 of the prohibition act, where the record of the express office and the affidavits of accused excluded every rational hypothesis of the innocence of the accused consistent with the evidence in the case, it is not error to refuse an instruction that the burden is upon the Commonwealth to prove beyond all reasonable doubt that the substance contained in the package delivered to the defendant was distilled spirits. Cochran *v.* Commonwealth, 801.

Receipt Oftener Than Once a Month.—An indictment under the prohibition act alleging the receipt and acceptance by the

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INTOXICATING LIQUORS—Continued.

Receipt Oftener Than Once a Month—Continued.

accused of delivery of one quart of distilled liquor on November 29th and another quart of same on December 23, 1916 (in effect two quarts of such liquor within the one calendar month beginning with November 29, 1916), charged an offense created by section 40 of the prohibition act, and an allegation in the indictment that the receipt and acceptance was "within a period of thirty days" may be treated as surplusage. Cochran *v.* Commonwealth, 801.

The prohibition act (Acts 1916, page 215), section 40, provides that no person shall receive or accept delivery from any express company of any ardent spirits brought into the State from any point without the State, or ardent spirits transported from one point to another point within the State, except that a person may receive one quart of distilled liquor not oftener than once a month. Section 3 of the Code of 1904 provides that, "Unless otherwise expressed the word 'month' shall be construed to mean a calendar month." Giving this meaning to the word "month" in the words "not oftener than once a month," it must be read as "not oftener than once a (calendar) month." So a receipt and acceptance of liquor in excess of one quart in the aggregate, between November 29th and December 23, 1916, inclusive, would have been a receipt and acceptance of such excess quantity of liquor oftener than once a calendar month. Cochran *v.* Commonwealth, 801.

Searches and Seizures.—Before the accused who was charged with violation of the prohibition law was arraigned, he petitioned the court to restore to him the suit case and the ardent spirits contained therein, which were taken from him by the policemen upon his arrest; a motion to like effect was made at the trial before the jury were sworn; and again, while the Commonwealth was introducing its evidence in chief, he objected to introduction of the evidence that the suit case contained such ardent spirits. Held: That such evidence was admissible. Lucchesi *v.* Commonwealth, 872.

Time of Offense.—At the January term, 1917, of the Circuit Court of Clarke county, an indictment was found against defendant charging that he "did within one year last past preceding the finding of the indictment unlawfully give away ardent spirits." The charge in the indictment that the defendant did unlawfully give away ardent spirits within one year next prior to the finding of the indictment, embraces a period of time anterior to November 1, 1916, after which

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INTOXICATING LIQUORS—Continued.

Time of Offense—Continued.

date the prohibition act by its terms went into effect. Previous to that time it was not necessarily unlawful to give away ardent spirits. Therefore, in such case, time was of the essence of the offense; and it was essential for the indictment to charge that the gift of ardent spirits imputed to the defendant occurred after the act became operative, and not before that time, although within one year prior to the finding of the indictment. Kennan *v.* Commonwealth, 831.

An indictment found at the January term, 1917, of the Circuit Court of Clarke county, charging that accused, within one year next prior to the finding of the indictment in the said county of Clarke, did unlawfully have in his possession at the same time two quarts of whiskey, is bad on demurrer, in that the prohibition law, under which the indictment was framed, did not go into effect till after November 1, 1916, and prior to that date it was not an offense for a person to have in his possession at one time two quarts of whiskey. Blair *v.* Commonwealth, 798.

Title of Prohibition Act.—Section 39 of the prohibition act is not unconstitutional as violative of section 52 of the Constitution of Virginia, because the body of the act in regard to "transportation" of ardent spirits is broader than its title, in that the title is confined in its reference to "transportation" to "transportation for sale." Burton *v.* Commonwealth, 847.

The prohibition act (Acts 1916, chapter 146, page 215) is not unconstitutional, in that it violates section 52, Constitution of 1902, in so far as it prohibits, by section 40, the acceptance and receipt of ardent spirits. The regulation of the acceptance and receipt of ardent spirits by transportation is not only in furtherance of the "enforcement" of the act mentioned in its title, but may be said to be essential thereto. Cochran *v.* Commonwealth, 801.

The regulation of the bringing into this State and of transporting from one point to another within the State of ardent spirits is certainly germane and in furtherance of the "enforcement" of the statute in respect to its regulation of the use and its prohibition of the keeping of ardent spirits for sale. While this is not so obviously true of the prohibition of the sale of ardent spirits, falling under the ban of the statute, it is essentially true of that also. Without regulation of the transportation of ardent spirits, the illicit sale thereof cannot be efficiently prevented. Hence, such regulation may be said to be not only germane and in fur-

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INTOXICATING LIQUORS—Continued.

Title of Prohibition Act—Continued.

therance of the enforcement of the statute, but that it is essential to its enforcement. Burton *v.* Commonwealth, 847.

All the provisions in the prohibition act against the transportation of liquor are congruous and germane to the title, and the methods devised for the accomplishment of its general purpose. Lucchesi *v.* Commonwealth, 872.

Transportation.—See *infra*, "Constitutional Law;" "Interstate Commerce."

Accused was arrested in the city of Richmond. He had arrived upon a train from Washington, D. C., which was going south, and had in his hand a suit case. He first said that he had no whiskey, but when arrested admitted that he had whiskey in the suit case. When the officers opened the suit case it was found to contain fourteen quarts of whiskey and a quart of bitters. Held: That the evidence was clearly sufficient, unless accused was upon an interstate journey, to convict him of the violation of the statute forbidding the transportation of more than one quart of liquor in this State in personal baggage. Lucchesi *v.* Commonwealth, 872.

Transportation.—*"For Use in This State"—"For Sale."*—Accused was indicted under section 39 of the prohibition act (Acts 1916, page 215) for personally and at one time bringing into the State, and also for personally and at one time transporting from one point to another within the State ardent spirits in excess of the quantity of one quart allowed by that section of the act. There were two counts in the indictment, neither of which contained any allegation to the effect that the liquor in question was "for use in this State." Held: That the indictment was not insufficient because of the lack of this allegation, as under section 39, neither as to the offense of the bringing of the liquor into this State, nor as to the transportation of it within the State, is it an essential ingredient of the offense that the liquor must be "for use in this State;" nor was the indictment insufficient because it lacked an allegation that the liquor in question was brought into this State, or transported from one point to another within this State, "for sale," the statute not providing that the liquor in question must be brought into the State "for sale," or transported from one point to another within the State "for sale," in order to create either of the offenses. Burton *v.* Commonwealth, 847.

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ISSUES TO JURY.

Appeal and Error.—In a suit for damages for diminution of water power, where an issue to a jury was awarded to determine the amount of damages to be awarded to the plaintiffs for the injuries sustained, the Supreme Court of Appeals will not treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions. Norfolk & W. R. Co. *v.* Allen, 603.

Weight Attached to Finding of Jury.—In a case where there was no certain standard for the admeasurement of the damages to be assessed, and there was serious conflict in the testimony as to the amount of the damages inflicted, an issue of fact was awarded. The sole question submitted to the jury was the amount of damages to be awarded the plaintiffs for the injury sustained and to be sustained, by reason of the acts done and proposed to be done by the defendant. No other question was submitted to them. Their assessment of the damages was approved by the trial court, and where this is the case, and no error is pointed out in the action of the court or the conduct of the case, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it. Norfolk & W. R. Co. *v.* Allen, 603.

JOINDER OF OFFENSES. See INDICTMENT AND INFORMATION.

JOINDER OF PARTIES. See AMENDMENTS.

Gifts.—See GIFTS.

JUDGMENTS AND DECREES. See FORMER ADJUDICATION OR RES ADJUDICATA.

Adverse Possession.—See ADVERSE POSSESSION.

Collateral Attack.—See DIVORCE.

Conclusiveness of Judgment.—See DIVORCE.

Creditors' Suits.—See CREDITORS' SUITS.

Full Faith and Credit.—See DOMICILE.

Judgment Liens.—See ADVERSE POSSESSION; VENDOR AND PURCHASER.

Lien of Judgments.—See ADVERSE POSSESSION; VENDOR AND PURCHASER.

Judgment Liens against Vendor.—See VENDOR AND PURCHASER.

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JUDGMENTS AND DECREES—Continued.

Lien of Judgments—Continued.

Rights of Judgment Creditor.—Both before and since the revision of 1887, it has been held that where the recording acts do not interfere the judgment creditor can acquire no better right to the estate than the debtor himself has at the date of the recovery of the judgment. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

JUDICIAL NOTICE.

Venue.—In the instant case it was contended that the Commonwealth failed to prove that the offense was committed in Giles county, as charged. The evidence showed that the stable from which the horse was taken was at Newport, and it appeared from an act of the General Assembly of Virginia that the village known as the town of Newport, in the county of Giles, was incorporated under that name. As the Supreme Court of Appeals will take judicial notice of charters of municipal corporations, the evidence was sufficient to show that the offense was committed in Giles county. Webb *v.* Commonwealth, 899.

JUDICIAL SALES AND RENTINGS. See MORTGAGES AND DEEDS OF TRUST.

Caveat Emptor.—The sale was a judicial sale, and the doctrine is well settled in this jurisdiction that the principle of *caveat emptor* strictly applies to judicial sales. Speaking generally, all objections of which the party complaining had previous knowledge come too late after a decree of confirmation. Sproul *v.* Hunter, 102.

Executor's Sale.— See EXECUTORS AND ADMINISTRATORS.

Title Conferred by.—A judicial sale of lands to satisfy liens is not a source of title, but merely a transmission of the title sold, and if at the time of the sale such title would not enable the holder thereof to make an entry or maintain an action, the purchaser cannot acquire any right of entry or action. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

JURISDICTION.

Appeal and Error.—Where the record shows that the trial court had no jurisdiction over the defendant, then a judgment against him is plainly wrong and must be reversed. Bank of Bristol *v.* Ashworth, 170.

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JURISDICTION—Continued.

Corporation Court.— See MORTGAGES AND DEEDS OF TRUST.

Annexation of Territory.—See MUNICIPAL CORPORATIONS.

Equity.— See PARTITION.

Deficiency in Quantity of Land.—See VENDOR AND PURCHASER.

Partnership.—See PARTNERSHIP.

Essential to Valid Judgment or Decree.—Where the record shows that the trial court had no jurisdiction over the defendant, then a judgment against him is plainly wrong and must be reversed. Bank of Bristol *v.* Ashworth, 170.

Exceptions.— See *infra*, "Raising and Waiving Objections to Jurisdiction."

Objections to Jurisdiction.—See *infra*, "Raising and Waiving Objections to Jurisdiction."

Plea to the Jurisdiction.—See "Abatement, Revival and Survival."

Raising and Waiving Objections to Jurisdiction.—See ABATEMENT, REVIVAL AND SURVIVAL.

In the instant case, after defendant's demurrer and pleas had been rejected, he moved the court to dismiss the proceeding because a court of law had no jurisdiction of the subject matter. Held: That the motion was a proper one, and the court rightly entertained it. Thacker *v.* Hubard, 379.

Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court, and if not brought to the attention of the trial court, it may be taken notice of by the appellate court, *ex mero motu*, for the first time. Thacker *v.* Hubard, 379.

Subject Matter.—By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court and is to be sought for in the general nature of its powers, or in authority specially conferred. If not fixed by the Constitution, the legislature alone can determine of what subjects the several courts of the State shall have jurisdiction. No consent of parties can confer it, and a judgment outside of the jurisdiction so conferred is simply void. Thacker *v.* Hubard, 379.

Territorial Limitation of Jurisdiction.—The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over him, if he is found

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JURISDICTION—Continued.

Territorial Limitation of Jurisdiction—Continued.

and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance. Bank of Bristol *v.* Ashworth, 170.

JURY.

Disqualification of Juror.— See NEW TRIAL.

Jury from Another County.— See VENUE.

New Trial.— See NEW TRIAL.

View by Jury.—The question of the propriety of ordering a view lies largely in the discretion of the trial court, which should only grant it when it is reasonably certain that it will be of substantial aid to the jury in reaching a correct verdict, and whose decision will not be reversed unless the record shows that a view was necessary to a just decision. Abernathy *v.* Emporia Mfg. Co., 406.

In the instant case, there was no controversy as to the location of the road, and the general conditions surrounding it, and there was no necessity for a view in order to assist the jury in understanding the testimony. The testimony in connection with a plat used on the trial would seem to have been clear enough without the necessity for a view. In addition to this, it appears that delay in the trial would have been caused by ordering a view, and that the plaintiff had not made any provision to take the jury to the scene of the fire. Held: That the trial court did not err in refusing to order a view. Abernathy *v.* Emporia Mfg. Co., 406.

Variance.—A writ of *venire facias* directed the officer to summon sixteen persons for the trial of "James and Wesley Green," and the return so described the defendants, while the indictment designated them as "James Green and Wesley Green." After the defendants had elected to be tried separately, a second, or supplemental, writ of *venire facias* directed the sheriff to summon two other persons for the trial of "James Green," and for these alleged variances there was a motion to quash both writs. Held: That these writs in all essential particulars complied with the statute, and the supposed discrepancy in the description of the defendants in the indictment and writs is immaterial, and could in no way have prejudiced their rights. Green *v.* Commonwealth, 862.

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JURY—Continued.

Venire Facias.—See *infra*. "Variance."

JUS DISPONENDI. See WILLS.

LACHES.

Specific Performance.—In a suit for specific performance the laches of the complainant will bar the relief. Thus, where more than thirteen years elapsed after the date of the contract sought to be specifically enforced, and there was no suggestion in the record as to the reasons for the delay in seeking its specific performance, such delay is a conclusive bar to relief. The parties to the contract must be construed to have mutually abandoned all right or claim thereunder. Hoster's Comm. *v.* Zollman, 41.

LANDLORD AND TENANT.

Lease.—A lease of lumber lands and a sawmill plant with an option to lessee to purchase the leased premises at a specified price, described the personal property conveyed as cars, engines, machinery and apparatus, then or thereafter placed on the real estate. Held: That the lease covered the entire lumber plant, including all of the property on the premises that was necessary to the operation of the plant, and none other. That is, such property as in the ordinary operation of such plant in the way that this was operated, would be considered as a part of the outfit for its operation. Thus, the following articles passed: A locomotive engine and logging cars; tools, implements and appliances, in use in operating the plant at the time of the lease; furniture, tools and equipment used in camp, shops, barns, office, etc., in actual use at the time of the lease. But supplies held in store for replacement or repairs of machinery and tools did not pass; nor foodstuffs, provisions and medicines for employees and horses, nor the horses used in hauling and work at the plant. Va. L., etc. Co. *v.* O. D. McHenry L. Co., 111.

Liability of Landlord.—See *infra*, "Parts of Premises Used in Common Controlled by Landlord."

Logs and Logging.—See *infra*, "Lease."

Negligence.—See *infra*, "Parts of Premises Used in Common Controlled by Landlord."

Notice to Quit.—*Must Be Unconditional.*—To terminate a tenancy from year to year a notice to quit by the landlord to the tenant must be unconditional. In the instant case,

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LANDLORD AND TENANT—Continued.

Notice to Quit—Continued.

there was no unconditional notice to vacate. The notice proposed a different kind of rent, or a renting for a part of the crop instead of a fixed money rent, and to this proposition the tenant replied, "he would do what was right." This was not a sufficient notice to terminate the tenancy. Kellam *v.* Belote, 537.

Waiver.—It appeared from the evidence that in the case at bar the tenant was in the habit of getting drunk, and after the notice to vacate the landlord sent him word "to stop drinking whiskey and go ahead as he had been doing." Held: That if the notice had been a sufficient notice it was waived by this message. Kellam *v.* Belote, 537.

In the case at bar plaintiff claimed that he was a purchaser for value from the landlord and had no notice of the waiver of notice to quit, but he knew of the tenancy from year to year and of the character of the notice that was given to terminate it, and, viewing the case as on a demurrer to the evidence, he had notice of the waiver, as a witness testified that he repeated the message of the landlord as to the tenant's stopping drinking and going ahead to the tenant in the presence of the plaintiff. Kellam *v.* Belote, 537.

Parts of Premises Used in Common Controlled by Landlord.—*Defective Skylight.*—In the instant case defendants leased to plaintiff's father, for the use of himself and family, including the plaintiff, an infant about six years old, three rooms on the second floor of a building owned by the defendants. These rooms opened upon another room, which was used in common by all of the tenants of the building. Defendants retained and exercised control over this room. In this room there was a skylight made of double-thick window glass, and not of the glass commonly used in making a skylight. Defendants knew of the weakness of this glass, but did not warn plaintiff. Prior to the lease of the rooms the defendants had erected a railing about thirty-two inches high around the skylight. Plaintiff climbed or fell through the opening between the planks of the railing, or from the top of the railing through the skylight to the floor beneath, as the result of which he was injured. The most cursory examination by the lessee would have disclosed the material of which the skylight was constructed. Neither the tenant nor any member of his family had any right thereon. The barrier stood as a constant notice and warning that it was not intended to be walked over, and all of these facts were

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LANDLORD AND TENANT—Continued.

Parts of Premises Used in Common Controlled by Landlord—Continued.

perfectly manifest. Held: That plaintiff could not recover in an action against defendants for damages for this injury. Berlin *v.* Wall, 425.

In the instant case the skylight in question was covered with dust, which plaintiff alleged concealed the defect. It was held, however, that if the accident was naturally to be anticipated, because of the accumulation of dust on the skylight, it was as much to be anticipated by the tenant as by the landlord. Berlin *v.* Wall, 425.

Duty of Landlord.—All that is required of a landlord who retains control of a room used in common by his tenants is that he should make and keep the room in a reasonably safe condition for the purpose to which it is devoted. In the instant case plaintiff had not been invited to go upon that part of the room about which the defendants had erected a barrier. Indeed, it had been definitely withheld from use, and the barrier not only cut it off and prevented such use by the tenants, but distinctly and definitely warned them not thus to use it. The part of the room taken up by the skylight was reserved by the lessors for the manifest purpose of giving light to the tenant of the room below, the railing was itself a proclamation of this reservation and the reason therefor, and the plaintiff had no access to the skylight except by ignoring the warning and climbing through or over the barrier. Neither the lessee nor his family had been invited to go inside of that barrier, and the railing was in itself sufficient notice of the reservation of the space so enclosed, a continuous prohibition against the use of such space and a constant warning of the danger of disregarding such notice, and the defendants did not owe to the tenant or his family the duty of protecting them against the consequences of such disregard. Berlin *v.* Wall, 425.

Liability of Landlord.—A landlord who leases separate portions of the same building to different tenants and retains control of the stairways and passageways used in common by all the tenants, is under an implied obligation to use reasonable care to keep the parts reserved in a safe condition for use, and a failure to perform that duty renders him liable for an injury resulting therefrom to a tenant or a member of his family, or any person properly on the premises who is himself free from fault. Berlin *v.* Wall, 425.

Though it is the duty of the landlord to keep in repair that portion of the leased premises which he retains for the use of the several tenants in common, still another general

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LANDLORD AND TENANT—Continued.

Parts of Premises Used in Common Controlled by Landlord—Continued.

Liability of Landlord—Continued.

rule is that the landlord is not liable to the tenant, or members of his family, whether infant or adult, for the defective condition or faulty construction of the leased premises over which the tenant has exclusive control existing at the time of the lease, unless there was misrepresentation, active concealment, or perhaps total inability on the tenant's part to discover the defect. Berlin *v.* Wall, 425.

In the instant case there was no failure to keep in repair, and the defect, if it was a dangerous defect, was apparent, and the railing stood there as a constant warning to the tenant and his family that the portion of the room within the barrier was not for common use, and that it was not such a skylight as could be safely walked over. Berlin *v.* Wall, 425.

Rights, Duties and Liabilities as to Possession and Use of Premises.—See *infra*, "Parts of Premises Used in Common Controlled by Landlord."

Several Tenants.—See *infra*, "Parts of Premises Used in Common Controlled by Landlord."

Skylight.—See *infra*, "Parts of Premises Used in Common Controlled by Landlord."

Tenancy from Year to Year.—See *infra*, "Notice to Quit."

Trees and Timber.—See *infra*, "Lease."

LARCENY.

Bill of Particulars.—An indictment for larceny charged in one count the larceny of a check for a certain amount, the property of another person, under section 3708, Code of 1904, and in another count the larceny of that amount of money, the property of the same person. The accused moved the court to require the Commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check. Held: That the court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged. Allen *v.* Commonwealth, 884.

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LARCENY—Continued.

Distinct Felonies.—An indictment for larceny charged in one count the larceny of a check for a certain amount, the property of another person, under section 3708, Code of 1904, and in another count the larceny of that amount of money, the property of the same person. The accused moved the court to require the Commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check. Held: That the court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged. Allen *v.* Commonwealth, 834.

Evidence.—In a trial for the larceny of a check given by an insurance company in settlement of a policy, accused claimed to have paid the proceeds of the check to an undertaker for burial expenses of the assured. A witness for the Commonwealth, an officer of the insurance company, over the objection of accused, was allowed to testify that the insurance company had never made any requirement as to funeral expenses of the assured. The trial court had instructed the jury that, if they believed that the accused had in good faith paid to the undertaker the amount which he claimed for the burial of the assured, then the accused was not guilty. Held: That there was no error in overruling accused's objection to this testimony, although a clause of the policy in evidence provided that the insurance company might pay the amount due under the policy to any person appearing to the company to be entitled to the same by reason of having incurred expense for the burial of the assured. Allen *v.* Commonmonwealth, 834.

Indictment and Information.—See *infra*, "Distinct Felonies;" "Ownership Alleged in Different Persons."

Instructions.—Accused was charged with the larceny of a horse. Upon the question of the intent of the accused in taking the horse the trial court, at the request of the Commonwealth, instructed the jury "that in criminal cases a man on trial is presumed to have intended that which is the necessary consequence of his act, and that the jury are the judges of the evidence and can draw such deductions from the entire evidence as in their judgment should be drawn therefrom and act on same in finding their verdict." The court also in-

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LARCENY—Continued.

Instructions—Continued.

structed, at the request of the accused, "that the burden of proof is on the Commonwealth to prove beyond all reasonable doubt each and every allegation of the indictment, and if the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offense, they are bound to give the accused the benefit of that doubt," and "that the intent of the accused at the time of the taking of the horse in the indictment mentioned is a material fact in this case, and that before they can convict him of the offense charged they must be convinced beyond all reasonable doubt that at the time he took it, he took it intending wholly to deprive the owner of this horse and without an intention to return it." In substance, the instruction given at the request of the Commonwealth has been repeatedly applied, and in the case at bar, as qualified by the other instructions, could not have misled the jury. Webb *v.* Commonwealth, 899.

Intent.—In a prosecution for larceny, it is essential for the Commonwealth to prove that the original taking was felonious; that is to say, that the taking was done with no intention to return the property taken, but to deprive the owner thereof permanently. Yet, whether or not there was such intent was a question of fact for the determination of the jury; and, if from the whole evidence, such intent might fairly be inferred, the verdict of the jury to that effect, approved by the trial court, ought not to be disturbed by an appellate court. It has been well said that there is not one case in a hundred where the felonious intent in the original taking can be proved by direct evidence. From the nature of the case, intent, generally, must be inferred from circumstances. Webb *v.* Commonwealth, 899.

In the instant case, the evidence tended to show that the horse was secretly and clandestinely taken in the night time, in the absence of the owner, without any claim of right and that no act had been done by the accused down to the time of his arrest to indicate a purpose to restore it to the owner, these were circumstances conducing to the belief that the taking was felonious; and, if the jury believed that these circumstances had been established, they were sufficient to warrant their finding accused guilty, notwithstanding the defendant's protestation of his innocence. Webb *v.* Commonwealth, 899.

Joinder of Offenses.—See *infra*, "Distinct Felonies."

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LARCENY—Continued.

Ownership Alleged in Different Persons.—The ownership of the alleged stolen property may be averred to be in different persons in different counts of the indictment. Allen *v.* Commonwealth, 834.

Questions of Law and Fact.—See *infra*, "Intent."

Variance.—Accused was convicted of grand larceny under an indictment containing a count charging him with the larceny of a check. In the count all the material parts of the check, the names of the drawer and drawee, the amount thereof, its date, and the bank upon which it was drawn, fully appeared. The number of the insurance policy, in settlement of which the check was given, was stated as 4660037, whereas the true number was 46600371. Having craved oyer of the check, the accused moved to quash the count, because of this variance. Held: That the court properly overruled this motion on the ground that the variance was immaterial. Allen *v.* Commonwealth, 834.

LAST CLEAR CHANCE.

The last clear chance doctrine presupposes the negligence of the party injured. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

Crossings.—Plaintiff's intestate was killed by being struck by a car of defendant, an electric interurban railway, which he had intended to board. Defendant's station was on the west side of the tracks and in order to reach it it was necessary for plaintiff's intestate to cross over the tracks. When a short distance from the tracks plaintiff's intestate and his brother, who was accompanying him, heard and saw the car approaching at a distance of 150 to 200 yards from the station. The car was running at a rate of from twenty to twenty-five miles per hour and carried a dim light. Seeing the car approaching, they quickened their speed, and as they approached saw several persons on the station platform signaling the car to stop. The car was scheduled to stop on signal and had uniformly theretofore done so, but on this occasion it neither slackened its speed nor stopped, and in continuing its course struck the intestate, who was attempting to cross the track, inflicting the injury of which he subsequently died. The car was in full view from the time it was first observed at a distance of 150 to 200 yards until the intestate was struck, and the evidence showed that the intestate was looking at the approaching car. Held: That the contributory negligence of plaintiff's intestate barred a re-

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LAST CLEAR CHANCE—Continued.

Crossings—Continued.

covery for his death; and that the doctrine of last clear chance was not applicable. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

The intestate was laboring under no physical disability. The car was in full view, and he was "looking at the car approaching." The motorman had the right to assume that he would not step in front of it. It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it. The fact that he was a passenger gave him no right to step upon the track in close proximity to the rapidly approaching car. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

In an action for personal injuries sustained at a grade crossing, where plaintiff drove his automobile upon the track from fifty to seventy-five feet in front of an approaching train, the refusal to give, at the request of the defendant, the following instruction, was error: "The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident." Norfolk So. R. Co. *v.* Smith, 302.

In an action for personal injuries sustained in an accident at a crossing, it appeared that the plaintiff drove his automobile upon the track of defendant about fifty or seventy-five feet before an approaching train and that plaintiff might have seen one hundred yards or more along the track after he passed a store which, until he was within twenty or more feet of the track, obstructed his view. Plaintiff testified that he never saw the train that struck him. The automobile could have easily been stopped at the speed at which it was going within seven or eight feet. It was demonstrated that the train could not have been moving rapidly at the time of the accident. Held: That, under such circumstances as these, the doctrine of the last clear chance can have no application whatever. The proximate cause of the accident was the negligence of the plaintiff in failing

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LAST CLEAR CHANCE—Continued.

Crossings—Continued.

to observe the approaching train, in failing to stop his car before reaching the railroad track, and in stopping it thereon almost immediately before the accident. Norfolk So. R. Co. *v.* Smith, 302.

Declarations and Admissions.—See *infra*, "Knowledge of Danger."

Evidence.—See *infra*, "Knowledge of Danger."

Instructions.—In an action for personal injuries sustained at a grade crossing, where plaintiff drove his automobile upon the track from fifty to seventy-five feet in front of an approaching train, the refusal to give, at the request of the defendant, the following instruction, was error: "The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident." Norfolk So. R. Co. *v.* Smith, 302.

Knowledge of Danger.—If one struck and killed by a railroad car saw the car in time to get out of the way, there could be no recovery by his administratrix, since the case would then lack the essential element of his unconsciousness of the danger, and his own negligence would bar the recovery. In that event the administratrix could not do more than make out a case of concurring negligence. Wilson's Adm'r *v.* Va. Portland R. Co., 160.

Deceased after being struck by a car said that he saw the car coming. Held: That this statement did not preclude deceased's administratrix from recovering damages for his death under the last clear chance doctrine. Plaintiff concedes that deceased saw the car after it was practically on him, but several of the witnesses stated that he never looked in the direction of the approaching car until it was too late for him to escape. In this state of the evidence, the jury would not have necessarily believed that he meant to say that he saw the car in time to get off the track. Wilson's Adm'r *v.* Portland R. Co., 160.

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LAST CLEAR CHANCE—Continued.

Master and Servant.—But in the instant case the jury might have found from the evidence, which was conflicting, that the brakeman in control of the car which struck decedent, saw decedent in time to stop the car, that decedent's attitude plainly indicated that he was unconscious of his danger and would be struck unless the car was stopped before it reached him, and that the brakeman's failure to do what a reasonably prudent man would have done under the circumstances was the proximate cause of the accident. Accordingly, the demurrer to the evidence ought to have been overruled. Wilson's Adm'r *v.* Va. Portland R. Co., 160.

The doctrine of last clear chance is not based upon any contractual relationship, but has its foundation in humanity and natural justice. The immediate circumstances of the accident in this case transpired in a very short space of time, but this is true in most cases of accidental injury, and lapse of time, provided it is appreciable, is not usually material. The lapse of time in the instant case was, according to plaintiff's witnesses, appreciable, and the evidence is not such as to bring it within the influence of the *White Case*, 117 Va. 342, 84 S. E. 646, and the *Shiflett Case*, 118 Va. 70, 86 S. E. 860. Wilson's Adm'r *v.* Va. Portland R. Co., 160.

In the instant case, there probably was not any duty of prevision on the part of the defendant, but this fact is immaterial since it affirmatively appears here that the brakeman, as the car entered the switch, actually saw defendant in a position and under circumstances sufficient to charge him with knowledge that "the man on the track paid no heed to his danger and would take no step to secure his own safety." Wilson's Adm'r *v.* Va. Portland R. Co., 160.

Statement of Deceased.—See *infra*. "Knowledge of Danger."

Underlying Principle.—The underlying principle of the doctrine of the "last clear chance" is, that notwithstanding the contributory negligence of the plaintiff, there is something in his condition or situation at the time of the injury to admonish the defendant that he is not able to protect himself. The doctrine is one of prior and subsequent negligence, or of remote and proximate cause, and pre-supposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. Where the negligence of both continues down to the moment of the accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery. Norfolk So. R. Co. *v.* Smith, 302.

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"LAW OF THE CASE."

Different Facts on Second Trial.—The doctrine of the "law of the case" can only be invoked, even between the same parties, where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts. Carter *v.* Washington & Old Dom. Ry., 458.

In an action by a railway mail clerk against a carrier for injuries sustained, it appeared that the accident was due to the removal of a device called a catcher and safety bar, fixed across the side doors of a postal car, as required by the regulations and instructions of the United States Post Office Department. On the first trial a judgment for plaintiff was reversed on the ground that the plaintiff knew of the removal of the bar and had acquiesced in its removal. But on the second trial it appeared from the plaintiff's testimony that he did not either know of the removal of the bar or acquiesce therein. Held: That the evidence upon the second trial as to the plaintiff's contributory negligence was materially different from the evidence upon the first trial with reference to that fact, and therefore the decision in the first case was not the law of the second case. Carter *v.* Washington & Old Dom. Ry., 458.

Statement of the Doctrine.—Where there have been two appeals in a case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Carter *v.* Washington & Old Dom. Ry., 458.

LEASE. See LANDLORD AND TENANT.

LEGAL CONCLUSIONS. See INDICTMENT AND INFORMATION.

LIBEL AND SLANDER.

Amendments.—*Limitation of Actions.*—See *infra*, "Limitation of Actions."

Candidate for Public Office.—See *infra*, "Privilege."

Damages.—See *infra*, "Origin of the Slander."

The words alleged in the declaration were proved to have been spoken as alleged. They were actionable *per se* under

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LIBEL AND SLANDER—Continued.

Damages—Continued.

the statute in Virginia on the subject. In such case no averment or proof of special damage is necessary. The declaration alleged that the words affected the plaintiff's business. If so, they were actionable *per se* at common law also and a general allegation and general proof of damages to the plaintiff's business was sufficient to sustain a finding by the jury of such damages without averment or proof of special damage to such business. Mopsikov *v.* Cook, 579.

Evidence.—See *infra*, "Hearsay Evidence."

In an action for slander, plaintiff's little daughter was allowed to testify that defendant's little girl called her a nigger doll. Held: That the admission of this testimony was reversible error, because it presented to the jury a statement to the plaintiff's daughter which was not made by the defendant, nor caused to be made by him, so far as appears from the record. Mopsikov *v.* Cook, 579.

Hearsay Evidence.—In an action for slander plaintiff testified "that his little girl said to him: 'Father, what is this they say about me, they say I am a nigger.' That he said to his little girl: 'No, darling, you are not, and they will be made to prove it.'" It nowhere appeared in the evidence that the defendant made the statement to the little girlt hat she was a negro, or that he caused it to be made. The fact that such a statement was made to the daughter was therefore inadmissible. Moreover, the father did not claim to know that the statement was in fact made to his daughter by anyone. The testimony of the father as to such statement was purely hearsay and hence also inadmissible. That error in the admission of such testimony was prejudicial to the defendant is obvious. Mopsikov *v.* Cook, 579.

Instructions.— See *infra*. "Origin of the Slander."

An instruction that if the jury believe from the evidence that the defendant did not originate the alleged slander that that should be considered in mitigation of damages, is on the subject of the weight of evidence, on which a trial judge must, under our practice, be particularly watchful and guarded in the matter of giving instructions to the jury, so as not to invade the rightful province of that important component part of the court. Mopsikov *v.* Cook, 579.

An instruction which plainly referred the questions of fact to the jury, both whether the defendant used the words in the declaration mentioned, and whether he used them in bad faith and with malice, did not assume that the defendant used such words. Mopsikov *v.* Cook, 579.

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LIBEL AND SLANDER—Continued.

Instructions—Continued.

Where there was no defense offered that the words complained of were not used in accordance with their usual construction and common acceptation, but the plaintiff expressly admitted so using them, an instruction is not erroneous because it contained the peremptory command that, if the jury believed that the alleged words were used and that such words from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace, the jury *must* find for the plaintiff. Mopsikov *v.* Cook, 579.

Justification.—See *infra*, "Privilege."

Limitation of Actions.—It was urged that the insulting words attributed to the defendant in the first count of the amended declaration constituted a new cause of action. If this position was sound, the plea of the statute was good, because the words were alleged to have been uttered at a date more than twelve months prior to the amendment. A careful comparison of the original and amended averments, however, lead the Supreme Court of Appeals to the conclusion that the new matter had reference to and was merely an amplification of the charges contained in the original, and that the case did not, as claimed by the defendant, fall within the influence of the decision of that court in *Irvine* v. *Barrett*, 119 Va. 587, 89 S. E. 904. Carpenter *v.* Meredith, 446.

Mitigation of Damages.—See *infra*, "Origin of the Slander."

Origin of the Slander.—The weight of authority is in favor of the view that if the defendant did not originate the slander, that is a circumstance which should be taken into consideration by the jury along with all the other evidence in the case, on the question of the presence or absence of actual malice, as distinguished from malice in law, in the speaking of defamatory words. At the same time, a defamatory statement not originated by him who repeats it, but one known by the latter to be false when he repeats it, may be as malicious as if originated by the slanderer. Hence, the isolated fact, if it be a fact, that the defendant did not originate the slander, may or may not mitigate the damages in a particular case. Mopsikov *v.* Cook, 579.

A request that the court instruct the jury in an action for slander that if they believe from the evidence that the defendant did not originate the alleged slander that that should be considered in mitigation of damages, was properly

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LIBEL AND SLANDER—Continued.

Origin of the Slander—Continued.

refused, in the absence of evidence on the part of the defendant as to his *bona fide* belief in the truth of his statement; and even though such evidence was present the trial court should avoid singling out the circumstance of the non-originating of the slander by the defendant; it should refer to that as merely one of the facts or circumstances to be considered by the jury along with all the other facts or circumstances in the case as bearing on the presence or absence of actual malice in the utterance of the slander, and should avoid the statement that such evidence might be considered by the jury in mitigation ofda mages. Mopsikov *v.* Cook, 579.

Parent and Child.—The mere relationship of father and child in the case at bar did not make the father legally responsible for the slanderous words of his minor daughter. Mopsikov *v.* Cook, 579.

Pleading.— See *infra*, "Damages."

Privilege.—As the plaintiff was the incumbent of a public office and a candidate for re-election, this rendered the occasion privileged, and it was the duty of the court to so declare, leaving it to the jury to determine whether the privilege was abused—that is to say, whether it was used in bad faith and with malice. But in the case at bar there could be no doubt that the language alleged to have been used by the defendant went beyond the realm around which the law, as recognized in this State, has thrown the protection of privilege, and constituted charges of moral turpitude and criminal dishonesty. There being no plea of justification, the charges were conclusively presumed to be false, and the trial court properly so instructed the jury. The failure to plead the truth of the words cut off any inquiry into that question. The only questions for the jury, therefore, were whether the defendant actually used the words, and, if so, what damage he should pay. These questions were submitted to the jury upon proper instructions and their verdict against the defendant must end the case. Carpenter *v.* Meredith, 446.

The conduct of candidates for public office is open to public criticism, and it is for the interest of society that their acts may be fully published with fitting comments or strictures. But the strictures and comments must not transcend the bounds of propriety prescribed by law. While a citizen has the right to make complaint of any misconduct or act

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LIBEL AND SLANDER—Continued.

Privilege—Continued.

showing a lack of qualification or fitness for office of a candidate, he may not falsely attribute moral turpitude to him. Carpenter *v.* Meredith, 446.

Weight of Evidence.—See *infra.* "Instructions."

LICENSES.

Civil Engineer.—Acts 1915, page 252, chapter 148, section 89, provides that any person or firm who shall for compensation engage in the business of civil, mining, mechanical or electrical engineering shall pay a license tax of fifteen dollars per year for the privilege of conducting such business, and that any person or firm violating the provisions of this section shall be fined, etc. Under this act the accused was indicted and convicted. The accused was engaged in the practice of his profession as a civil engineer, but not in the general practice of it, in the sense that he was open to employment by the public or any part thereof. He was in the exclusive employment of another, a railroad company. Held: That section 89 of chapter 148, Acts 1915, does not impose a license tax upon the mere practice of one's profession as a civil engineer—the mere acting as a civil engineer—when such an one is not engaged in his own business as such engineer. Derrick *v.* Commonwealth, 906.

The legislature might have provided that a civil engineer should pay a license tax if he practiced his profession at all, or acted at all as a civil engineer, as it did, in effect, in respect to lawyers and dentists practicing their professions; but it did not. By section 89 aforesaid, a different provision is made, and one who practices his profession as a civil engineer—one who acts as a civil engineer, *i. e.*, does that kind of work—is not merely for that reason required to pay a license tax. There is something more specified as to such action before the license tax is imposed, namely, the action must be such that it constitutes a "business of civil * * * engineering," otherwise it is not subject to any license tax. Derrick *v.* Commonwealth, 906.

The *business* of civil engineer, which is taxed by the statute (Acts 1915, page 252, chapter 148, section 89), must be a person's *own business* in which he is engaged, in order to subject him to the tax. This feature of this section of the statute is not peculiar to it, however. It inheres in the meaning with which the word "business" is used in other sections of the same statute; for example, in section 45, pro-

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LICENSES—Continued.

Civil Engineer—Continued.

viding that "every person, firm * * * engaged in the business of a merchant shall pay a license tax," and similar provisions in other sections as to other businesses. No one would contend that a salesman employed by a merchant having no other interest or connection with the business, was engaged in the business of a merchant, within the meaning of the statute. Derrick *v.* Commonwealth, 906.

Merchants.—It has been the policy of our law for years to impose a license tax on merchants as the exclusive method of State taxation, and to permit a property or *ad valorem* tax thereon by localities. It is not surprising, therefore, to find that the General Assembly, in launching a new but tentative and partial segregation plan of taxation, should have refrained from disturbing the status of the tax laws as to this particular property. A judicial construction in keeping with this natural and probable legislative purpose avoids conflict, and harmonizes all the provisions of the law enacted on the subject at the extra session of 1915, and its effect is to take from the general class of intangible personal property segregated to the State, the capital of merchants and to place it, as heretofore, in a class to itself. City of Richmond *v.* Drewry-Hughes Co., 178.

Merchant's Tax.—See MUNICIPAL CORPORATIONS.

When is a Person Engaged in His Own Business.—The mere fact that one is employed by another does not furnish a valid test of whether the former is or is not engaged in his own business. All professional men and those engaged in any kind of work for others, whether skilled or unskilled, are employed by others even when the former are engaged in their own business. When one is employed by another, the true test of whether the former is engaged in his own business, or the business of the latter, is the character of the employment. Is the former an independent contractor and as such in the employment of another and doing work for such other; or is the former a mere servant or ordinary employee of another? In the case first stated, the person employed is engaged in a business of his own, although doing work for another. In the second case, the person employed is engaged in the business of his employer, and not in a business of his own. Derrick *v.* Commonwealth, 906.

LIEN OF JUDGMENTS. See ADVERSE POSSESSION; JUDGMENTS AND DECREES; VENDOR AND PURCHASER.

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LIFE INSURANCE. See *infra*, "Interest of Beneficiary."

Beneficiary.—See *infra*, "Interest of Beneficiary."

Executors and Administrators.—See *infra*, "Interest of Beneficiary."

Interest of Beneficiary.—A policy of life insurance issued on the ten-payment life plan provided that the insured might, upon the surrender of the policy, with the written approval of the president, or vice-president, of the insurance company, change the beneficiary, and also that after the policy had been in force three years, the insurance company would grant, in conformity with its rules, a cash loan, and that from any sum payable under the policy there should be deducted the indebtedness of the insured or beneficiary to the company "on account of this contract or otherwise." The insured paid the premiums in advance for the first seven years the policy ran out of his individual funds. But for each of the eighth, ninth and tenth years, he borrowed from the company the amount necessary to pay the premium for the ensuing year and the interest in advance for one year on his indebtedness for such loans. And after the last loan the insured executed to the company a note in which all loans from the company were consolidated. The note provided that it should be a first lien on the policy. After the death of the insured, the amount of the policy, less the the amount of the note given for loans on the policy, was paid to the beneficiary. Held: That the beneficiary was not entitled to recover in an action of assumpsit against the executor of the insured, the amount of the note as a debt against the estate which had been paid out of her property. Walker *v.* Penick's Ex'or, 664.

The beneficiary in a life insurance policy is not entitled to recover from the estate of the insured—which is solvent and more than sufficient to discharge all obligations of the estate, including bequests made in insured's will—the amount of a loan obtained by the insured from the insurer on the policy as collateral security and under the provisions contained therein, which amount was used by the insured in the payment of premiums due on the policy and interest on the loan, and which was deducted by the insurance company in a settlement under the policy with the beneficiary. Walker *v.* Penick's Ex'or, 664.

In the instant case the policy provided for the payment of $10,000 to the beneficiary, upon proper proof of the death of the insured, but this promise was made expressly "subject to all the requirements, privileges and provisions stated" in

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LIFE INSURANCE—Continued.

Interest of Beneficiary—Continued.

the policy, one of which provisions was that if any loan should be made to the insured, the amount thereof *"shall be deducted"* from "any sum payable hereunder." The designation of the plaintiff as beneficiary in the policy gave her the right, if there was no change in the beneficiary, to whatever was payable on the policy, according to its terms, and nothing more. Her right to recover on the policy accrued at the death of the insured, and she was then entitled to the policy, or its proceeds. Her designation as beneficiary constituted a gift from the insured, and was never intended to, and did not, create any liability upon the donor, or his estate. This gift became effectual on the death of the donor, and consisted of whatever sum was demandable of the company at that time. Walker *v.* Penick's Ex'or, 664.

Under the terms of the policy, the company itself could not have enforced the payment of the note, after the death of the insured, out of any other fund than that pointed out by the policy as the primary fund for the payment thereof. At the death of the insured, the net sum due on the policy was the extent of the liability of the company by reason of the policy, and, under its terms, providing for the deduction of the note, that sum was all the beneficiary was entitled to receive. As she has received that sum, no part of her estate was ever applied to the payment of the note. Walker *v.* Penick's Ex'or, 664.

Order of Payment of Debts of Decedent.—See *infra*, "Interest of Beneficiary."

LIMITATION OF ACTIONS.

Amendments.—It was urged that the insulting words attributed to the defendant in the first count of the amended declaration constituted a new cause of action. If this position was sound, the plea of the statute was good, because the words were alleged to have been uttered at a date more than twelve months prior to the amendment. A careful comparison of the original and amended averments, however, lead the Supreme Court of Appeals to the conclusion that the new matter had reference to and was merely an amplification of the charges contained in the original, and that the case did not, as claimed by the defendant, fall within the influence of the decision of that court in *Irvine* v. *Barrett*, 119 Va. 587, 89 S. E. 904. Carpenter *v.* Meredith, 446.

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LIMITATIONS OF ACTIONS—Continued.

Presumptions and Burden of Proof.—Where the statute of limitations is pleaded, the burden is upon the party pleading the statute to show by a preponderance of the evidence that the cause of action arose more than the statutory period before the suit was brought. Va. L. Etc. Co. *v.* O. D. McHenry L. Co., 111.

LOGS AND LOGGING.

Lease of Sawmill and Lumber Land.—See LANDLORD AND TENANT.

MAIL CLERK. See CARRIERS OF PASSENGERS.

MALARIA. See WATERS AND WATERCOURSES.

MALICE. See INDICTMENT AND INFORMATION.

MANDAMUS.

Drains and Sewers.—By an act of Assembly it was the duty of defendant railroad to drain an old canal bed, so as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected. Held: That the discharge of the duty in question could be fully enforced, if need be, by the appropriate remedy of mandamus. Ches. & O. R. Co. *v.* Catlett, 232.

MASTER AND SERVANT.

Assumption of Risk.— See *infra*, "Instructions Read Together."

Breach of Contract of Employment.—See *infra*, "Damages."

Contributory Negligence.—See *infra*, "Railroad Tracks."

Damages.—Where a breach of contract of employment occurs before the party thereto claiming damages for its breach has fully performed the contract on his part, he must, as soon as he knows of such breach of contract, minimize his damages by engaging in other employment, if he can obtain it, and not persist in thereafter continuing, in order to aggrevate his damages, in a course of conduct which can under the circumstances be of no value to the party who has broken the contract. But this rule has no application to the instant case, where the profits in question were all completely earned by the defendants before they knew or had any intimation of the breach of contract on the part of the plaintiffs. New Idea Co. *v.* R. M. Rogers & Sons, 54.

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MASTER AND SERVANT—Continued.

Degree of Care Required of Master.— Va. Portland Cement Co. *v.* Swisher, 123.

Fellow Servants.— See FELLOW SERVANTS.

Inspection.— See *infra*, "Safe Place to Work."

Instructions Read Together.—In an action against a master for the death of his servant through negligence, the jury were instructed that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place for the servant to work in, and that if the defendant failed in this, and if such failure was the immediate and sole proximate cause of the servant's death, they must find for the plaintiff; and that while an employee assumes all risk naturally incident to his employment, yet this does not relieve the master from the duty of using reasonable care and diligence in providing a reasonably safe place for the servant to work in, and if the jury believes that the master did not use ordinary care to provide such a place, and that such failure was the sole proximate cause of the injury complained of, the defendant was liable. Another instruction restated these propositions and told the jury that if the master failed to maintain a reasonably safe place, and that he knew or ought to have known it in the exercise of reasonable care, and that such failure was the cause of the injury complained of, he was liable. While admittedly correct statements of abstract propositions of law, it was objected to these instructions that they were defective, in that they overlooked the fact that there could be no recovery if the negligence of the defendant was within the risk assumed by the plaintiff. If there is any force in this objection it had no application in the instant case, as another instruction which, on its face, told the jury that it was to be read in connection with the instructions set out, told the jury that they were not to find for the plaintiff if they believed from the evidence that the accident occurred through any risk, assumed, and that an employee does assume all risks incident ordinarily to the service and those known to him, or so obvious as to be readily observed by him. This addendum to these instructions, it is believed, covers fully all of the objections suggested. Va. Portland Cement Co. *v.* Swisher, 123.

In an action against a master for the death of a servant, the court instructed the jury that if they believed from the evidence that the plaintiff's death was due to a defective step, "and that the master, as in said instructions defined,

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MASTER AND SERVANT—Continued.

Instructions Read Together—Continued.

had or should have had knowledge thereof," the master was liable. It was objected to this instruction that it should have said, that in order to make the master liable he, in the exercise of ordinary care, must have had, or should have had, such knowledge. Held: That there was no force in this objection, as the instructions specifically ordered to be read in this connection told the jury that the master was only required to exercise ordinary care. Va. Portland Cement Co. *v.* Swisher, 123.

Last Clear Chance.—But in the instant case the jury might have found from the evidence, which was conflicting, that the brakeman in control of the car which struck decedent, saw decedent in time to stop the car, that decedent's attitude plainly indicated that he was unconscious of his danger and would be struck unless the car was stopped before it reached him, and that the brakeman's failure to do what a reasonably prudent man would have done under the circumstances was the proximate cause of the accident. Accordingly, the demurrer to the evidence ought to have been overruled. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

The doctrine of last clear chance is not based upon any contractual relationship, but has its foundation in humanity and natural justice. The immediate circumstances of the accident in this case transpired in a very short space of time, but this is true in most cases of accidental injury, and lapse of time, provided it is appreciable, is not usually material. The lapse of time in the instant case was, according to plaintiff's witnesses, appreciable, and the evidence is not such as to bring it within the influence of the *White Case*, 117 Va. 342, 84 S. E. 646, and the *Shiflett Case*, 118 Va. 70, 86 S. E. 860. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

In the instant case, there probably was not any duty of prevision on the part of the defendant, but this fact is immaterial since it affirmatively appears here that the brakeman, as the car entered the switch, actually saw defendant in a position and under circumstances sufficient to charge him with knowledge that "the man on the track paid no heed to his danger and would take no step to secure his own safety." Wilson's Adm'x *v.* Va. Portland R. Co., 160.

Minimizing Damages.—See *infra*, "Damages."

Railroad Tracks.—See *infra*, "Last Clear Chance."

Plaintiff's intestate was struck and killed by a moving car on the yards of defendant railroad company. Intestate was

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MASTER AND SERVANT—Continued.

Railroad Tracks—Continued.

standing on a track looking intently at the fireman on an engine on another track about eight feet from the track on which he was standing, when he was struck by an empty flatcar, which, without his knowledge, had just previously been cut loose from the engine and shunted into the track on which he was standing, by an operation familiarly known as a flying switch. The fireman and others attempted to warn him of his danger, but he did not seem to understand, and all the witnesses who testified stated that although he was plainly in imminent danger, he was obviously unconscious of it until it was too late for him to save himself. He was familiar with the yard and its operation, and knew that it was a common practice to make flying switches. Held: That if the evidence had ended here, defendant's demurrer to the evidence would have been sustained, as plaintiff's intestate was plainly guilty of contributory negligence. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

Testimony as to the distance within which a car could be stopped by one who had had thirteen years' experience as yard brakeman, and who was furnished full information as to the size and character of the car, the rate of speed at which it was running, the condition of the brakes and the grade of the track, is not without probative value. Such evidence is usual and appropriate for the purpose for which it was introduced. Wilson's Adm'x *v.* Va. Portland R. Co., 160.

Safe Place to Work.—See *infra*, "Instructions Read Together."

Inspection—Obvious Defects.—Steps used by a servant at his place of work were unsafe, both on account of the lack of a hand-rail and from the fact that a step was imperfectly nailed. The servant reported to his master that there was no railing on the steps, which was an obvious danger, but did not report that the step was imperfectly nailed, which was not an obvious danger and which could not have been discovered by the servant, except upon an inspection, which the evidence did not show was the servant's duty to make. Held: That it was the master's duty to inspect the steps and the servant had a right to assume that this duty had been performed, and not unless the defect was an obvious one was he charged with negligence in failing to report, or with any assumption of risk incident thereto. Va. Portland Cement Co., *v.* Swisher, 123.

Instructions.—An instruction in effect told the jury that after a servant had called his master's attention to a par-

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MASTER AND SERVANT—Continued.

Safe Place to Work—Continued.

Instructions—Continued.

ticular danger at his place of work and was told by the master that he must continue to work, and that when other work that was then in progress was completed this particular danger would be removed, if the servant continued to work in these circumstances, so far as this particular danger was concerned, he continued at his own peril. Held: That this instruction went as far as the court could go upon the master's theory as to this particular danger. Whether it did not go too far in that respect was a question which the appellate court did not decide, because it was given at the instance of the appellant. Va. Portland Cement Co. *v.* Swisher, 123.

Promise of Master.—Where the master promises or gives the servant reasonable ground to infer or believe that a defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise or assurance as would be reasonably allowed for its performance, unless the danger is so palpable, immediate and constant (of which there is no evidence in this case) that no one but a reckless person would expose himself to it, even after receiving such promise or assurance. Va. Portland Cement Co. *v.* Swisher, 123.

A servant met his death from a fall from an unrailed stairway, by reason of a step being defectively nailed. The evidence showed that a few days before the accident the servant had complained of the absence of a hand-rail and had asked his foreman to make this stairway safe and the foreman had told him to go on with his work and that the place would be fixed as soon as possible. Held: That, in these circumstances, an instruction telling the jury, as a matter of law, that the servant assumed all the risks incident to the lack of a railing at the point in question, would have been erroneous, and that under the evidence it was a question for the jury (upon proper instructions) whether the servant assumed the risk, or exercised due care in remaining in the master's service, relying upon the promise to provide a hand-rail. Va. Portland Cement Co. *v.* Swisher, 123.

Steps.—One who uses steps may assume that all parts of them are safe. He is not required to walk in the middle of them. Va. Portland Cement Co. *v.* Swisher, 123.

Steps.—See *infra*, "Safe Place to Work."

Warning.—See *infra*, "Safe Place to Work."

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MASTER IN CHANCERY.

Report of Commissioner.—See APPEAL AND ERROR.

MERCHANT'S TAX. See MUNICIPAL CORPORATIONS.

MILLS AND MILLDAMS.

Damage to Mill Owner by Diminution of His Water Power.—Norfolk & W. R. Co. *v.* Allen, 603.

MINORS. See CRIMINAL LAW; INFANTS.

MISJOINDER OF PARTIES. See AMENDMENTS.

MITIGATION OF DAMAGES. See DAMAGES.

MORTGAGES AND DEEDS OF TRUST.

Amount of Property to Be Sold.—See *infra*, "Sale of More Property Than Necessary to Satisfy the Debt."

Assumpsit.—Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. But in the instant case there was no property or money in the hands of the grantee, as the property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency; therefore, the foregoing rule has no application to the instant case. Thacker *v.* Hubard, 379.

Assumption of Mortgage Debt.—*Action at Law by Mortgagee Against Party Assuming Debt.*—Where a grantee, as a part of the consideration for the purchase of real estate, agreed by parol to pay to the grantor's debtor a debt secured by a deed of trust on the land sold, the creditor cannot sue the grantee on the promise to pay the debt because of want of privity between the creditor and the grantee. Thacker *v.* Hubard, 379.

Code of 1849, chapter 116, section 2, provides that: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The act applies as well to promises (though not under seal) as to covenants, and in either case, to entitle a

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MORTGAGES AND DEEDS OF TRUST—Continued.

Assumption of Mortgage Debt—Continued.

third person to sue thereon, the promise or covenant must have been for his sole benefit, and an agreement between the grantee of land and the grantor that the grantee should pay off and discharge the mortgage debt on the land, is not for the sole benefit of the mortgagee. Thacker *v.* Hubard, 379.

Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. But in the instant case there was no property or money in the hands of the grantee, as the property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency; therefore, the foregoing rule has no application to the instant case. Thacker *v.* Hubard, 379.

Relation of Mortgagor and Mortgagee.—No agreement between the mortgagor and his grantee that the latter shall assume the mortgage debt, can change the relations of the mortgagor and mortgagee, and require the latter to treat the mortgagor as a mere surety for the debt, without the assent of the mortgagee, but when the assent of the mortgagee has been given, equity, by a quasi subrogation, and in order to avoid a multiplicity of suits, gives to the mortgagee the benefit of all the collateral obligations for the payment of the debt which the surety (mortgagor) holds for his indemnity. Thacker *v.* Hubard, 379.

Specialty or Simple Contract.—A grantee in a deed assumed the payment of notes which the grantor had given and secured by a deed of trust upon the property conveyed as a part of the consideration for the conveyance. The deed contained an express agreement that the grantee would assume the payment of the said notes, but though the deed was accepted by the grantee it was not signed by his. Held: That as the grantee did not sign the deed in which the payment of the notes was expressly assumed, but simply accepted it, his contract to pay was not a specialty, but a simple contract debt. Thacker *v.* Hubard, 379.

Caveat Emptor.—The rule of caveat emptor applies with full force to sales made under deeds of trust to secure creditors. The deed is the chart by which the trustee is to be governed. He is a special agent with designated powers, and a purchaser at a sale made by him takes upon himself the risk not only of the fairness of the sale, but of the regu-

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MORTGAGES AND DEEDS OF TRUST—Continued.

Caveat Emptor—Continued.

larity thereof, and of his compliance with all the substantial requirements of the instrument under which he acts. Such purchaser is chargeable with notice of the extent and limitation of the trustee's powers. He is bound not only by *actual* notice, but by *constructive* notice as well, which is the same in effect as actual notice. If he has notice, actual or constructive, that the trustee is exceeding his authority in making the sale, or is not complying substantially with the terms of the instrument creating the power of sale, he does not occupy the position of a purchaser without notice. Smith *v.* Woodward, 356.

Corporation Court.—See *infra*, "Removal of Trustee and Appointment of Substitute."

Improvements.—Code of 1904, section 2760, allowing recovery for improvements restricts such recovery to one "holding the premises under a title believed by him * * * to be good." This section has no application to one who is not a *bona fide* purchaser, and a person with notice, actual or constructive, of infirmity in his title cannot recover for improvements. Smith *v.* Woodward, 356.

Where suit is brought to set aside a trustee's sale under a deed of trust within about forty days after the date of the sale, and thirty days after the purchaser obtained his deed, the grantor is not chargeable with negligence in bringing his suit, and of standing by and seeing the purchaser put valuable improvements on the place without making known his objections. Smith *v.* Woodward, 356.

Jurisdiction.—See *infra*, "Removal of Trustee and Appointment of Substitute."

Parties to Action.—See *infra*, "Assumption of Mortgage Debt;" "Proper Parties in Suit to Set Aside Sale."

Proper Parties in Suit to Set Aside Sale.—While in the instant case a part of the debt secured by the first deed of trust was originally paid from the proceeds of the dwelling, yet before the decree complained of was entered, the terms of sale of the farm and factory had been complied with, and the court, with ample funds in hand, by the decree complained of, readjusted the rights of the parties so as to indemnify the other funds from the proceeds of the sale of the farm and thereby in effect to discharge the full amount of the debt secured by the first deed of trust from the proceeds of the farm, and leave the residue of the proceeds of

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MORTGAGES AND DEEDS OF TRUST—Continued.

Proper Parties in Suit to Set Aside Sale—Continued.

the farm and the whole of the proceeds of the dwelling and peanut factory to the creditors secured by the second and third deeds of trust. This was a proper method of procedure, and as the debt secured by the first deed of trust was wholly discharged from the proceeds of the farm, the creditor was neither a necessary nor proper party to the suit to set aside the sale of the dwelling. Smith *v.* Woodward, 356.

Purchaser without Notice.—In the instant case, the purchaser at the trustee's sale had constructive notice of the contents of the deed under which he purchased, and of the amount of the debt secured, and, being also the purchaser of the farm, he knew that the farm had brought ample to pay that debt; he knew, therefore, that the deed had served its purpose, and that it was improper for the trustee to undertake to make further sales under that deed, and that such sale would at least be irregular. Smith *v.* Woodward, 356.

One who was present at the sale and bid $3,600 on the dwelling which was cried out to the purchaser at $3,650, and had notice of the same facts with which the purchaser was chargeable, as stated in the preceding headnote, and afterwards paid the purchaser $100 for his bargain, taking his deed directly from the trustee, stands on no higher footing than if the property had been cried out to him at the trustee's sale. Smith *v.* Woodward, 356.

Recording Acts.—See RECORDING ACTS.

Removal of Trustee and Appointment of Substitute.—*Compliance with Statute.*—The proceeding under section 3419, Code of 1904, to substitute a new trustee for the original trustee named in the instrument creating the trust, is a statutory one and the express requirements of the statute must be at least substantially complied with in order that the court may have the jurisdiction of the subject matter conferred by the statute. Abrahams *v.* Ball and Others, 197.

Jurisdiction of Court.—Section 3419, Code of 1904, provides that when a trustee removes from the State, or declines to accept the trust, or resigns, the circuit court of the county or the corporation court of the corporation, in which the deed or other writing creating the trust "is, or might have been recorded, may, on motion of any person interested, appoint a trustee" in the place of the trustee named in the instrument. A motion under this section shall be after reasonable notice to all parties interested in the execution of

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MORTGAGES AND DEEDS OF TRUST—Continued.

Removal of Trustee and Appointment of Substitute—Continued.

Jurisdiction of Court—Continued.

the trust other than the plaintiff in such motion. The deed in the instant case was properly recorded in the county of Prince George, the city of Hopewell not then being in existence. But after the incorporation of the city of Hopewell, the land conveyed by the deed of trust being situated in the city as incorporated, the deed of trust was recorded in the clerk's office of the Corporation Court of the city of Hopewell. When the notes secured by the deed of trust became due, the creditors secured by the notes moved in the Corporation Court of Hopewell to substitute a new trustee for the original trustee on the ground that the original trustee had removed beyond the limits of the State. Held: That as the deed in question might have been recorded in the Corporation Court of the city of Hopewell in contemplation of law, as it was in fact recorded, that being so recorded at the time the proceeding in the instant case was instituted, the corporation court had jurisdiction of the subject matter of the proceeding, in so far as such jurisdiction depended upon the place of recordation of the deed of trust. Abrahams *v.* Ball and Others, 197.

Notice to Original Trustee.—In proceedings under section 3419, Code of 1904, to substitute a trustee, the original trustee in a deed of trust is "interested in the execution of the trust," and is a necessary party to the proceeding and the statute requires notice to him of the proceeding. Abrahams *v.* Ball and Others, 197.

Subsequent Grantee.—After a deed of trust had been given, the grantor therein conveyed a one-half interest in the land, subject to the deed of trust, to another. Held: That the grantee of the one-half interest was a necessary party to proceedings under section 3419, Code of 1904, to substitute a trustee in the deed of trust. Abrahams *v.* Ball and Others, 197.

Rights of Purchaser at Irregular Sale.—In Virginia, the legal title which is vested in the trustee of a deed of trust to secure the payment of a debt, may be conveyed by him without compliance with the conditions named in the deed, as the trustee has an estate coupled with an interest and not a mere naked power; consequently, an irregular sale by a trustee to a purchaser who has paid his money and obtained a deed from the trustee is valid in law. But in equity the rule is otherwise, and the title of a purchaser at such a sale

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MORTGAGES AND DEEDS OF TRUST—Continued.

Rights of Purchaser at Irregular Sale—Continued.

will not be upheld unless there has been at least a substantial compliance with the terms of the deed conferring the power of sale, and if a sale is made after the debt secured has been paid, it will be set aside. Smith *v.* Woodward, 356.

The trustee had the power to make a deed to the purchaser in the instant case, in the sense that he was invested with the legal title and could convey that legal title to another, and the grantee would be the owner at law, but it is not true that the grantee would thereby acquire the beneficial ownership of the land as between him and the grantor in the trust deed. Smith *v.* Woodward, 356.

Sale.—*Caveat Emptor.*—See *infra*, "Caveat Emptor."

Parties.—See *infra*, "Proper Parties in Suit to Set Aside Sale."

Purchaser without Notice.—See *infra*, "Purchaser without Notice."

Rights of Purchaser at Irregular Sale.—See *infra*, "Rights of Purchaser at Irregular Sale."

Several Deeds of Trust.—In the instant case, at the time of the sale under the first deed, there had been no default under the second and third deeds, and the creditors secured therein had no control over, or right to interfere with, the sale being made under the first deed. Smith *v.* Woodward, 356.

Unauthorized Act of Trustee.—See *infra*, "Unauthorized Act of Trustee."

Sale of More Property Than Necessary to Satisfy the Debt.—*Consent of Debtor.*—In the instant case the consent of the debtor to the sale of the dwelling house after the farm had been sold for sufficient to satisfy the debt secured and the costs, could not be implied from his assent to an arrangement by which he was to have possession of the farm and the rents, issues and profits thereof, for the remainder of the year in which the sale was made. Smith *v.* Woodward, 356.

Duty of Trustee.—It is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject without saying or so much thereof as may be necessary to satisfy the purposes of the trust. That is always implied, unless a contrary intention plainly appears. Smith *v.* Woodward, 356.

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MORTGAGES AND DEEDS OF TRUST—Continued.

Sale of More Property Than Necessary to Satisfy the Debt—Continued.

Estoppel of Owner.—In the instant case it was contended that the debtor was estopped by his conduct from objecting to the sale, and, in support of that contention, reliance was placed upon the fact that the sale was advertised as at the request of the debtor, that such request had in fact been made, and that he had held the trustee out as his agent to sell, that he was present at the sale and made no announcement of his revocation of his authority, and raised no objection at the time to the fairness and legality of the sale. It appeared, however, that the consent given was for a sale under the first deed *for the purposes of that deed*, that the debtor was not actually present when the dwelling was sold, and, if the trustee had been constituted the agent of the debtor to sell his land, he was a special agent, with limited authority, and the purchaser dealt with him at his hazard. The debtor was on the ground and could easily have been consulted, and, if consulted, it would have been ascertained that no such agency as was claimed had ever been created, or, if created, it had been revoked. Smith *v.* Woodward, 356.

Setting Aside Sale.—The owner of three parcels of real estate, consisting of a tract of land, a dwelling house and a factory lot, conveyed it to a trustee to secure the payment of a bond. Subsequently, two other deeds of trust were executed by the owner, on the same property, to the same trustee, to secure creditors. Upon default upon the first bond and upon demand for sale the owner requested the trustee to advertise only the dwelling and the factory lot, and not the farm. The trustee refused and said he would advertise the whole. The trustee did not advertise at that time, but did subsequently advertise the property to be sold under the first deed of trust. No request for a sale was made under the other deeds of trust, nor did it appear that the debtor was in any default in relation thereto. In making the sale the trustee claimed to have acted upon the request of the grantor, but it appeared that whatever authority, if any, had been conferred by the request of the grantor, was withdrawn before the sale, and the trustee was requested not to sell any more land than was necessary to pay the debt. The farm was sold first and brought enough to satisfy the debt secured and the costs. After the sale of the farm the trustee sold the dwelling and the factory lot. From the advertisement of the sale it appeared that the property was to be sold under the first deed of trust and that the sale under that deed was to be made at the request of both the debtor

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MORTGAGES AND DEEDS OF TRUST—Continued.

Sale of More Property Than Necessary to Satisfy the Debt—Continued.

Setting Aside Sale—Continued.

and the creditor. Held: That the decree of the circuit court setting aside the sale of the dwelling house and adjusting the rights of the parties must be affirmed. Smith v. Woodward, 356.

Setting Aside Sale.—See *infra*, "Sale of More Property Than Necessary to Satisfy the Debt."

Improvements.—See *infra*, "Improvements."

Parties.—See *infra*, "Proper Parties in Suit to Set Aside Sale."

Substitution of Trustee.—See *infra*, "Removal of Trustee and Appointment of Substitute."

Transfer of Property Encumbered by Mortgage or Deed of Trust. See *infra*, "Assumption of Mortgage Debt."

Trustee.—See *infra*, "Removal of Trustee and Appointment of Substitute;" "Sale of More Property Than Necessary to Satisfy the Debt."

Unauthorized Acts of Trustee.—See *infra*, "Unauthorized Act of Trustee."

Unauthorized Act of Trustee.—A court of equity will not permit a grantor in trust to be deprived of his property by an unauthorized act of the trustee, and will set aside a sale and conveyance where the trustee has exceeded the authority conferred upon him, or sold the grantor's land after the purposes of the trust have been accomplished, and especially where the purchaser has notice, actual or constructive, of the facts. Smith *v.* Woodward, 356.

MOSQUITOES. See WATERS AND WATERCOURSES.

MUNICIPAL CORPORATIONS.

Amendment of Franchise.—See *infra*, "Extension of Time to Bidder for Municipal Franchise."

Annexation of Territory.—See COUNTIES.

Jurisdiction of Corporation Court.—In the certificate of incorporation of the defendant company, the place wherein its principal office was to be located was designated as "Hopewell, Prince George county, Virginia." Afterwards the community known as Hopewell was severed from the county and incorporated as the city of Hopewell. Held: That the severing of the territory from the county of Prince George, just as it changed the citizenship of every

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MUNICIPAL CORPORATIONS—Continued.

Annexation of Territory—Continued.

Jurisdiction of Corporation Court—Continued.

natural person then domiciled within the area thus severed, so it also changed the location of the principal offices of all corporations which were located within that area. And if defendant corporation's principal office was located in the territory incorporated as the city of Hopewell, the Corporation Court of that city had jurisdiction of an action against it. Builders Supply Co. *v.* Piedmont L. Co., 225.

Bidding.— See *infra*, "Franchise."

Charities.— See CHARITIES.

Contracts.— See *infra*, "Franchise."

Corporation Court.— See MORTGAGES AND DEEDS OF TRUST.

Enlargement and Restriction of Corporate Bounds.— See *infra*, "Annexation of Territory."

Franchise.— *Extension of Time to Bidder for Municipal Franchise.*—An ordinance extending additional time to a company for supplying municipal lighting, the company having been awarded as the lowest bidder a franchise for lighting the streets, etc., of the city, was not an amendment of the original franchise, and, therefore, illegal for noncompliance with paragraph 5 of section 1033-f of the Code of 1904. The ordinance was adopted on application of the corporation; and besides it was not an amendment or extension of the franchise, but simply an extension of time on *the contract*, within which to furnish municipal lighting, and the city was within its rights in granting the indulgence. Portsmouth *v.* Portsmouth Corp, 258.

Requiring Deposit of Check as Prerequisite to Bidding.— A city ordinance authorizing the granting of a franchise for lighting the streets, etc., of the city required each bidder to accompany his bid with a certified check payable to the city treasurer in the sum of $5,000, to be forfeited to the city as liquidated damages should he fail to comply with his bid and execute the contract in the event of his bid being accepted. Held: That this provision of the ordinance did not violate section 125, Article VIII, of the Constitution of 1902, nor section 1033-f of the Code of 1904. Portsmouth *v.* Portsmouth Corp., 258.

The bond provided for in section 1033-f, Code of 1904, is required for the franchise and for the discharge of the duties thereby imposed in conformity with the statute, whereas the certified check, required by the ordinance in the instant case,

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MUNICIPAL CORPORATIONS—Continued.

Franchise—Continued.

Requiring Deposit of Check as Prerequisite to Bidding—Continued.

was intended to insure the execution of the contract, and in case of failure, to indemnify the city by way of liquidated damages for the breach. There is nothing either in the Constitution or statute which forbids such stipulation, and the requirement is not unusual in transactions of this kind. Portsmouth *v.* Portsmouth Corp., 258.

Lien for Taxes.—See *infra*, "Taxation."

Merchant's Tax.—It has been the policy of our law for years to impose a license tax on merchants as the exclusive method of State taxation, and to permit a property or *ad valorem* tax thereon by localities. It is not surprising, therefore, to find that the General Assembly, in launching a new but tentative and partial segregation plan of taxation, should have refrained from disturbing the status of the tax laws as to this particular property. A judicial construction in keeping with this natural and probable legislative purpose avoids conflict, and harmonizes all the provisions of the law enacted on the subject at the extra session of 1915, and its effect is to take from the general class of intangible personal property segregated to the State, the capital of merchants and to place it, as heretofore, in a class to itself. City of Richmond *v.* Drewry-Hughes Co., 178.

As merchants' capital is not embraced in the classification of schedule C of the tax bill, but remains where it has practically always been, in a class to itself, subject to a license tax only by the State but liable to a local property tax, and the propriety and legality of such a classification has been too long recognized in this State to admit of serious question, and is, moreover, plainly authorized by section 169 of the Constitution of 1902, therefore, there is no force in the contention that if this construction is correct, the segregation act itself is unconstitutional because it violates section 168 of the Constitution of 1902, requiring uniformity in taxation. City of Richmond *v.* Drewry-Hughes Co., 178.

Powers of City to Tax—Acts 1915, p. 119.—The capital of merchants is intangible personal property, and under Acts 1915, page 119, it cannot be taxed by a city at a higher rate than thirty cents upon the one hundred dollars of assessed valuation thereof. The State imposes a license tax on merchants regulated by the amount of their purchases. The language of the act "that the capital of merchants shall not

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MUNICIPAL CORPORATIONS—Continued.
Merchant's Tax—Continued.
Powers of City to Tax—Continued.
be subject to State taxation, but may be taxed locally as prescribed by law," means that such capital shall not be subject to State taxation on the *ad valorem* basis so long as the State continues to tax merchants with a license, and that as to local taxes they must be in accordance with the general law of the State, and had reference to the preceding provision of the same section placing a maximum of thirty cents thereon. City of Richmond *v.* Drewry-Hughes Co., 178.

The capital of merchants is "intangible personal property" within the meaning of the tax laws. By the express terms of the segregation act (Acts 1915, page 119), such capital is excepted from taxation by the State in the ordinary sense (that is, upon an *ad valorem* basis), and, therefore, is not within the class of intangible property segregated for State taxation, but is subject to be taxed locally "as prescribed by law." The phrase "as prescribed by law" does not mean the prescribed rate of thirty cents mentioned in the segregation act, but means that the local taxation of merchants' capital is to be controlled by other statutory provisions outside of the terms of that act; and statutory provisions outside of the segregation act, contemplating and authorizing a tax on merchants' capital at such rate as the county and city authorities deem necessary and proper, and thus responding to the expression "as prescribed by law," are found in section 69 of the charter of the city of Richmond (under which tax here in question was levied) and in sections 833-a and 1043 of the Code and section 46 of the tax bill. City of Richmond *v.* Drewry-Hughes Co., 178.

The language of the act in regard to merchants' capital is, "Except that the capital of merchants shall not be subject to State taxation but may be taxed locally as prescribed by law." The words "as prescribed by law" were not apt and natural words to convey the idea that local taxation on merchants' capital was to be limited to the rate fixed by the act. If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named in that particular act, undoubtedly he would have used the words "as prescribed by this act," or their equivalent, instead of "as prescribed by law." The purpose of the General Assembly seems to have been to leave merchants' capital to be taxed by localities practically as it had been prior to the passage of the segregation act, and

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MUNICIPAL CORPORATIONS—Continued.

Merchant's Tax—Continued.

Powers of City to Tax—Continued.

this becomes the more apparent upon a consideration of the terms of that act in connection with the other kindred provisions of the tax laws enacted at the same time. City of Richmond *v.* Drewry-Hughes Co., 178.

Repeal of Statutes.—The question of the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in the instant case was expressly given by statute and had been exercised for many years. The real question is whether the former law has been repealed by implication by the segregation act, for it certainly has not been repealed thereby in express terms. Repeals by implication are not favored. But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive. City of Richmond *v.* Drewry-Hughes Co., 178.

Uniformity.—As merchants' capital is not embraced in the classification of schedule C of the tax bill, but remains where it has practically always been, in a class to itself, subject to a license tax only by the State but liable to a local property tax, and the propriety and legality of such a classification has been too long recognized in this State to admit of serious question, and is, moreover, plainly authorized by section 169 of the Constitution of 1902, therefore, there is no force in the contention that if this construction is correct, the segregation act itself is unconstitutional because it violates section 168 of the Constitution of 1902, requiring uniformity in taxation. City of Richmond *v.* Drewry-Hughes Co., 178.

Statutes.—*Object Must Be Expressed in Title.*—See STATUTES.

Taxation.—See *infra*, "Merchant's Tax."

City of Richmond's Powers.—While the city of Richmond under its charter has plenary powers of taxation, its power to tax any particular property is subject to any limitation

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MUNICIPAL CORPORATIONS—Continued.

Taxation—Continued.

City of Richmond's Powers—Continued.

that may be placed thereon by the legislature. City of Richmond *v.* Drewry-Hughes Co., 178.

Constitutional Law.—The act of March 6, 1900 (Acts 1899-1900, page 944, chapter 864), entitled an act to amend and re-enact certain sections of the act of May 24, 1870, providing a charter for the city of Richmond and the acts amendatory thereof, is not invalid as being in conflict with section 16, Article X, of the Constitution of 1869, or with section 50 of the Constitution of 1902. These constitutional provisions are substantially similar, providing that every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and a reference to any other law to fix such tax or object shall not be sufficient. The act referred to simply extends the lien of the city of Richmond for taxes and neither imposes, continues nor revives a tax. Powers *v.* Richmond, 328.

These provisions that a law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is applied, apply only to ordinary and general taxes for State purposes, and such as are imposed generally on all the taxable property in the State, and not to local taxes for local purposes. From the earliest date, the local authorities in the counties and cities of the Commonwealth have by the General Assembly been authorized to impose local taxes, and fix the rates thereof. Powers *v.* Richmond, 328.

The act of March 6, 1900 (Acts 1899-1900, page 944, chapter 864), entitled an act to amend and re-enact certain sections of the act of May 24, 1870, providing a charter for the city of Richmond and the acts amendatory thereof, securing to the city a lien on the interest of a remainderman in property assessed to the life tenant, is not unconstitutional as violative of section 168 of the Constitution of 1902, in view of section 117 of the Constitution of 1902, preserving municipal charters. Powers *v.* Richmond, 328.

Many charters existed in Virginia at the time the new Constitution was adopted, and many of them had and still have special provisions; and section 117 of the Constitution was clearly intended to continue all such special acts, except in so far as they were repealed by the Constitution or by the General Assembly. In addition to this, section 1 of the schedule of the Constitution expressly preserves all existing statutes which are neither repugnant to the constitution nor expressly repealed. Powers *v.* Richmond, 328.

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MUNICIPAL CORPORATIONS—Continued.

Taxation—Continued.

Due Process of Law.—The act of March 6, 1900 (Acts 1899-1900, page 944, chapter 864), providing that the lien of the city of Richmond for taxes shall be on the land and every interest therein, is not unconstitutional as violating the fourteenth amendment of the Constitution of the United States. Where a tax is levied on property according to its value, the law must afford an adequate method for the correction of errors, and where this is done it constitutes due process of law, and the due process clause of the fourteenth amendment is satisfied if an opportunity be given to all those who are interested to question the validity of the amount of the tax either before that amount is ascertained, or in subsequent proceedings for its correction. Powers *v.* Richmond, 328.

Life Tenant and Remainderman.—Under section 465, Code 1904, property is properly assessed for taxation in the name of the life tenant, and when so assessed the taxes constitute a lien on the property. Powers *v.* Richmond, 328.

Limitation of Time within Which City of Richmond May Enforce Lien.—There is no limitation on the time within which the city of Richmond may enforce the lien which it has under its charter for taxes assessed by the city on real estate; the city charter prescribes no limit. Powers *v.* Richmond, 328.

NEGLIGENCE.

Appeal and Error.—See APPEAL AND ERROR.

Carriers of Passengers.—See CARRIERS OF PASSENGERS.

Concurring Negligence.—See LAST CLEAR CHANCE.

Contributory Negligence.—See CARRIERS OF PASSENGERS; CROSSINGS; LAST CLEAR CHANCE; MASTER AND SERVANT.

In an action for personal injuries sustained at a grade crossing, the court instructed the jury that the burden of proving contributory negligence was upon the defendant. This was erroneous, as the instruction should have concluded, "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances," or with language of similar import. Norfolk So. R. Co. *v.* Smith, 302.

Degree of Care.—See *infra*, "Foundation of Liability."

Duty or Obligation to Party Injured.—See *infra*, "Foundation of Liability."

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NEGLIGENCE—Continued.

Fellow Servants.—See FELLOW SERVANTS.

Fires.—See FIRES.

Foundation of Liability.—It is fundamental that in an action for personal injury alleged to have been occasioned by the negligence or default of another, it must be shown that the defendant owed some duty or obligation to the party injured which he failed to discharge. It is always easy after an accident has occurred to show that, if something which was not done had been done, the accident could have been prevented; but proper care in such a case does not require the anticipation of every accident that can happen, or the providing of every conceivable safeguard for the prevention of any possibility of an accident. It does, however, require the exercise of reasonable care to avoid accidents which, according to observation and experience, are likely to happen. Berlin *v.* Wall, 425.

Landlord and Tenant.—See LANDLORD AND TENANT.

Last Clear Chance.—See LAST CLEAR CHANCE.

Presumption of Negligence.—See CARRIERS OF PASSENGERS.

Questions of Law and Fact.—Where the facts as to the alleged negligence are clear and undisputed, the court must say as a matter of law whether or not they constitute negligence, and this is true whether the issue is raised by demurrer to the declaration or demurrer to the evidence. Berlin *v.* Wall, 425.

Res Ipsa Loquitur.—See CARRIERS OF PASSENGERS.

NEGOTIABLE INSTRUMENTS LAW. See BILLS, NOTES AND CHECKS.

NEW TRIALS.

Chancellor.—See *infra*, "Motion Before Law Judge Not Before Chancellor."

Conclusiveness of Verdict.—Under section 3484, Code of 1904, the case of the plaintiff in error was before the Supreme Court of Appeals as upon a demurrer to the evidence, and the rule is settled by numerous decisions of that court that the verdict of a jury will not be set aside on writ of error where, when so considered, there is sufficient evidence to support it. Webb *v.* Commonwealth, 899.

Conflicting Evidence.—See APPEAL AND ERROR.

Upon a motion to set aside a verdict as contrary to the law and the evidence, the court cannot undertake to sub-

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NEW TRIALS—Continued.

Conflicting Evidence—Continued.

stitute its judgment for that of the jury, even in cases where it thinks the judgment is not sustained by the weight of the evidence, if there be any serious conflict in it. Va. Portland Cement Co. *v.* Swisher, 123.

Disqualification of Juror.—The trial court has a discretion when a motion for a new trial is made on the ground of a statement of a juror prior to the trial showing extreme prejudice against the accused, subject to review by the appellate court, which will not be interfered with unless it appears that some injustice has been done. Allen *v.* Commonwealth, 834.

Judge.—See *infra*, "Motion Before Law Judge Not Before Chancellor."

Juror.—See *infra*, "Disqualification of Juror."

Motion Before Law Judge Not Before Chancellor.—In a court which has both common law and chancery jurisdiction, and in which the same judge administers both, it is immaterial before which branch of the court a motion to set aside the verdict upon an issue out of chancery and award a new trial is made. Norfolk & W. R. Co. *v.* Allen, 603.

Verdict Contrary to or against Law and Evidence.—See *infra*, "Conflicting Evidence."

In considering a motion to set aside a verdict as contrary to the law and the evidence, the Supreme Court of Appeals is controlled by the demurrer to the evidence rule, section 3484 of the Code of 1904, and is prohibited from setting aside any verdict merely because of a serious conflict in the evidence. The motion cannot prevail unless the evidence upon which the verdict of the jury is based is clearly insufficient to support it. Bowen's Ex'or *v.* Bowen, 1.

NOTICE TO QUIT. See LANDLORD AND TENANT.

NUISANCES.

Public Service Corporations.—See EMINENT DOMAIN.

Railroads.—The change of method of operating the terminal yards in the instant case consisted, in ultimate fact, in withdrawing the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing (and) retraining" of cars; and the subsequent use of such tracks for the "transporation" of cars of coal; but such transportation was essentially a rehandling—a retraining—a switching yard trans-

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NUISANCES—Continued.

Railroads—Continued.

portation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation. Killam *v.* Norfolk & W. R. Co., 541.

Terminal Plant of Railroad.—Killam *v.* Norfolk & W. R. Co., 541.

Railroads, Switch Yards, Repair Shops or Terminal Plant.—Killam *v.* Norfolk & W. R. Co., 541.

OPINION EVIDENCE. See EXPERT AND OPINION EVIDENCE.

ORDER OF PROOF.

The order in which proof is introduced is a matter in the discretion of the trial court. Lysle Milling Co. *v.* Holt & Co., 565.

ORDERS. See ASSIGNMENTS.

PARENT AND CHILD.

Cruelty to Children.—See CRUELTY TO CHILDREN.

Libel and Slander.—The mere relationship of father and child in the case at bar did not make the father legally responsible for the slanderous words of his minor daughter. Mopsikov *v.* Cook, 579.

PAROL EVIDENCE.

Deeds.—See *infra*, "Description of Land."

Description of Land.—The object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do, without helping evidence—but to furnish the means of identification; when that is done it is sufficient. That is certain which can be made certain, and evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter. Harper *v.* Wallerstein, 274.

Specific Performance.—Where in a suit for specific performance of a contract for the sale of land, the whole transaction, as it appeared from the bill and the contract, was involved in so much doubt and obscurity that it was impossible therefrom to ascertain just what the parties agreed to, specific perform-

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PAROL EVIDENCE—Continued.

Specific Performance—Continued.

ance of the contract will not be decreed. While parol evidence may be introduced to supply deficiencies in the description of the land, or to explain ambiguities in the agreement, such evidence cannot be introduced to supply the lack of an agreement, or by construction to alter or vary it and create a different agreement from that to which the parties have assented. In the case at bar the vendee was insane and two of the vendors were dead. The danger of any attempt to remove the obscurities apparent upon the face of the document by the parol evidence of strangers to the contract was, therefore obvious. Hoster's Comm. *v.* Zollman, 41.

Vendor and Purchaser.—See *infra*, "Description of Land."

PARTIES.

Assumption of Mortgage Debt.—See MORTGAGES AND DEEDS OF TRUST.

Contracts.—The general rule at common law was that, whether the contract was express or implied, by parol or under seal, or of record, the action must be brought in the name of the party in whom the legal interest was vested, and that this legal interest was vested in the person to whom the promise was made, and consequently that he or his privy was the only person who could sue in a court of law upon such contract. Thacker *v.* Hubard, 379.

Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach. Where the right of the creditor is derivative only, his remedy is in equity and not at law. Thacker *v.* Hubard, 379.

But some exceptions to this general rule were recognized at an early day, and others have been made since. Thus, in contracts *not under seal*, it has been held, for two centuries or more, that any one *for whose benefit* the contract was made may sue upon it; that is, if A promises Z, not under seal, but for valuable consideration, to pay B $1,000, B may in his own name maintain an action against A. But where the promise is *under the seal of the promisor*, the common law never relaxed its requirement that the action should be brought by the promisee alone, or his personal representative, and not by any one *for whose benefit*, ever so expressly, the promise was made; a rule which is particularly inflexible where the deed is an *indenture* or *inter partes*. Thacker *v.* Hubard, 379.

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PARTIES—Continued

Creditors' Suits.—Assuming, but not deciding, that one who has secured title to property through adverse possession is a proper party in a creditor's suit to enforce the lien of judgment against a former owner of the property, and that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations (section 2915, Code of 1904) must be held to protect the adverse claimant if he shows sufficient facts as to the character and duration of his possession. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Substitution of New Party.—See AMENDMENTS.

PARTITION.

Equitable Estate.—Under the provisions of section 2565 of the Code of 1904, a court of equity has jurisdiction to partition equitable estates in land. So where a decedent was the complete equitable owner of a lot at the time of his death, equity may decree that the lot be sold for partition among his heirs at law, upon a bill filed by some of the heirs against the remaining heirs for partition. Stewart *v.* Stewart, 642.

Jurisdiction.—See *infra*, "Equitable Estate."

PARTNERSHIP.

Accounting on Dissolution.—See *infra*, "Rescission."

Affidavit of Partnership.—See AFFIDAVITS.

Dissolution.—See *infra*, "Rescission."

Unless the parties agree upon a division in kind, the distribution of the assets between the partners upon dissolution should be made by selling all the partnership property, both real and personal, and dividing the net proceeds. For neither party has a right to compel a division of the specific subject in kind, or require the other to accept what, according to a valuation, his interest may be worth. Equity always directs the value of the subject to be ascertained in the way in which it can be best ascertained, by sale and conversion into money. Gathright *v.* Fulton, 17.

Equity Jurisdiction.—See *infra*, "Rescission."

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PARTNERSHIP—Continued.

Fraud and Deceit.—Partner obtaining secret profit. Gathright *v.* Fulton, 17.

Rescission.—A court of equity has jurisdiction to rescind and declare void *ab initio* a contract of partnership which has been procured by fraudulent representations. But the principles and the terms upon which equity will rescind a partnership contract for fraud are the same as those upon which other contracts may be rescinded for that cause. Gathright *v.* Fulton, 17.

Appellant entered into a partnership agreement with appellees to buy real property, and through false representations secured a secret profit. Held: That, appellees having unequivocally asserted the purpose of holding on to the fruits of their contract with appellant, they could not now, if they desired, be heard to ask for a rescision *ab initio*, and a restitution from him; that, the only way to afford appellees relief for fraud of appellant is to dissolve the partnership; and, under the prayer for a settlement of accounts and for general relief, an account should be made up according to the usual and established method of settling a partnership on a dissolution, placing the first cost of the farm at $30,000, and denying appellant the $4,000 profit which he undertook to make off of his partners. The net assets after payment of the debts, if any, and the payment to each partner of what he is entitled to receive for his cash contribution to the enterprise, should be equally divided among the three partners. Gathright *v.* Fulton, 17.

PLACE OF BUSINESS. See CORPORATIONS.

PLEA. See CRIMINAL LAW.

PLEADING.

Amendments.—See AMENDMENTS

Bill of Particulars.—See BILL OF PARTICULARS.

Continuance.—See *infra*, "Time of Filing."

Corporation Commission.—See CORPORATIONS.

Declaration.—*Assumpsit or Trespass on the Case.*—See ASSUMPSIT.

Sufficiency.—Under the Virginia statute, Code 1904, section 3272, a declaration is not demurrable unless something so essential to the action is omitted that judgment according to the law and the very right of the case cannot be given.

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PLEADING—Continued.

Declaration—Continued.

Sufficiency—Continued.

In the case at bar, an action for damages for personal injuries sustained at a railroad crossing, the four counts in the declaration gave the date and place of the accident, and such particulars thereof as plainly informed the company of every fact relied on by the plaintiff, which was essential to enable it to make its defense. The company was charged with negligence in several particulars, and with failure to exercise ordinary care to avoid the accident after, by the exercise of such care, it should have seen the plaintiff's danger. This was sufficient, and the court below properly overruled the demurrer. Norfolk So. R. Co. *v.* Smith, 302.

Demurrer.—See *infra*, "Declaration."

Dilatory Pleas Not Favored.—See ABATEMENT, REVIVAL AND SURVIVAL.

Duplicity.—A plea in abatement set up as a defense that neither the cause of action, nor any part of it, arose within the jurisdiction of the trial court, and also that at the time of the service of the writ upon the defendant, defendant was within the jurisdiction solely for the purpose of defending another suit brought against him by the plaintiff. Held: That the plea was bad for duplicity. Fitzgerald *v.* So. Farm Agency, 264.

Where a plea in abatement presents two distinct and sufficient defenses, either of which, if true, would necessitate a finding on the issue in favor of the pleader, the plea is bad for duplicity. Fitzgerald *v.* So. Farm Agency, 264.

Filing.—See *infra*, "Time of Filing."

General Issue.—See SALES.

Plea.—See SALES.

Striking from Record.—See RECORD.

Time of Filing.—*Application for Continuance.*—Usually the proper time for a defendant to tender his defense is when the case is called on the docket, if he has not previously done so, and if, as in the instant case, he desires a continuance, he must not only show cause for it, but the court usually requires, as a part of the price for the continuance, that he shall make up the issue, so that there may not be further cause for delay when the case is again called for trial. Of course, if good cause can be shown why the issue cannot or should not then be made up, that too will be continued.

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PLEADING—Continued.

Time of Filing—Continued.

But the general rule is to require the issue to be made up before the continuance is granted. Thacker *v.* Hubard, 379.

Case at Bar.—In the case at bar, in the order of continuance leave was given to the defendant to demur or plead at any time during the then term of court. The defendant did not demur or plead during that term, though the court continued in session for some days after the order was entered. When the case was called for trial at the term to which it had been continued, the defendant tendered his demurrer and pleas. Held: That there was no error in the action of the court in rejecting defendant's demurrer and pleas. Thacker *v.* Hubard, 379.

Discretion of Court.—A very large discretion is vested in the trial courts in the matter of the time for filing pleadings and otherwise preparing a case for hearing, and when not controlled by statute, as for example under section 3288 of the Code of 1904, their action will not be set aside unless plainly erroneous. Thacker *v.* Hubard, 379.

A very large discretion is vested in the trial courts as to the time of filing and perfecting pleadings, and the Supreme Court of Appeals will not reverse a case unless the action is clearly erroneous and harmful. Dean *v.* Dean, 513.

Time Limited by Court.—It is not uncommon, however, for the court to grant the continuance, and in the order granting it, to prescribe a time within which the defendant shall file his pleadings, and this is not objectionable, as it gives counsel additional time within which to prepare the pleadings, and, at the same time, by requiring the issues to be made up in advance, obviates the danger of a continuance when the case is next called for hearing. And when such time limit has been prescribed, the defendant who has not complied with the order has not "the right to demur or plead as a matter of right," but must show good cause why he has not complied with the order of the court, and if he fails to do so, it may exclude his pleadings. Thacker *v.* Hubard, 379.

Variance.—See VARIANCE.

POSTAL CLERK. See CARRIERS OF PASSENGERS.

PRESUMPTIONS AND BURDEN OF PROOF.

Abatement, Revival and Survival.—Upon a plea to the jurisdiction, or in abatement, just as is the case with other affirmative pleas, the burden of proof is, as a general rule, on the defendant. Builders Supply Co. *v.* Piedmont L. Co., 225.

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PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Carriers of Goods.—See CARRIERS OF GOODS.

Circumstantial Evidence.—See *infra*, "Inference from a Presumption."

Inference from a Presumption.—All facts which are proved in a case in the same manner as if they were the very facts in issue—that is, by evidence of logical probative value, either direct (testimonial) or circumstantial, may serve as a basis from which further inference may be drawn. Since all facts in issue may be proved by circumstantial evidence, as well as by direct or testimonial evidence, and every fact proved by circumstantial evidence is but an inference from such evidence, where a fact is proved in a case as a fact, although by inference from circumstantial evidence, such fact may itself be taken as a basis for a new inference of fact. Ches. & O. R. Co. *v.* Ware, 246.

Notwithstanding that there was no direct evidence before the jury that a train had in fact passed the point of origin of the fire at or about the time of the fire in question, where such fact was established by circumstantial evidence, the jury may infer from the fact of the passage of the train at that time, in connection with other facts, that the fire was set out by the train as it passed the point of origin of the fire. Ches. & O. R. Co. *v.* Ware, 246.

The fundamental error in the instruction set out in the preceding headnote is that an ordinary reader or juror would be apt to construe it to mean that a jury cannot draw an inference of fact from circumstantial evidence; that such an inference is a presumption based upon a presumption, which cannot serve as an intermediate fact from which (along with other circumstantial evidence) the jury may draw another inference of fact. The error of this position is pointed out by the Supreme Court of Appeals in the case of *C. & O. Ry. Co.* v. *Ware*, *ante*, page 246, 95 S. E. 183. Torbert *v.* Atlantic Coast Line R. Co., 682.

The inference that the mosquitoes which caused the malaria complained of were bred in the bed of the old canal was not proved as a fact in the case, and in the very nature of the subject under the circumstances of the instant case could not by any possibility have been so proved. In such case, the rule that "an inference cannot be drawn from a presumption, but must be founded upon some fact legally established," applies. See *Chesapeake and Ohio Railway Company* v. *Ware*, *post*, 246, 95 S. E. 183. Ches. & O. R. Co. *v.* Catlett, 232.

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PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Inference from a Presumption—Continued.

In an action for damages by fire, the court instructed the jury "that in order to warrant a verdict against the defendant, the evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established." Held: That the instruction was not erroneous, while the statement in the instruction, that an inference cannot be drawn from a presumption, but must be founded upon some fact legally established, could not have been very helpful to the jury, yet in view of other instructions given in the case it could not have led them astray. Abernathy *v.* Emporia Mfg. Co., 406.

Innocence.—See *infra*, "Presumption of Innocence."

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Limitation of Actions.—Where the statute of limitations is pleaded, the burden is upon the party pleading the statute to show by a preponderance of the evidence that the cause of action arose more than the statutory period before the suit was brought. Va. L. Etc. Co. *v.* O. D. McHenry L. Co., 111.

Presumption Based upon Presumption.—See *infra*, "Inference from a Presumption."

Presumption of Innocence.—On a trial under the prohibition act, the following instruction was asked for and refused: "The court instructs the jury that the accused is presumed to be innocent." Held: No error, as it in effect announced a conclusion of the court, that notwithstanding the evidence in the case the accused was still presumed to be innocent. The correct rule on the subject is that the accused is presumed to be innocent until his guilt is established by the evidence. Cochran *v.* Commonwealth, 801.

Res Ipsa Loquitur.—See CARRIERS OF PASSENGERS.

Sufficiency of Evidence to Establish Fact.—A fact cannot be established, whether by direct (testimonial) or circumstantial evidence unless there is some evidence which has some logical probative value to establish the fact. Ches. & O. R. Co. *v.* Catlett, 232.

PREVAILING PARTY. See COSTS.

PRINCIPAL AND AGENT. See AGENCY.

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PRISONS AND PRISONERS. See REFORMATORIES.

PRIVATE INTERNATIONAL LAW. See CONFLICT OF LAWS.

PRIVILEGE. See LIBEL AND SLANDER.

PROBATE. See EXECUTORS AND ADMINISTRATORS; WILLS.

PROCESS. See SERVICE OF PROCESS.

PROXIMATE AND REMOTE CAUSE. See LAST CLEAR CHANCE.

PUBLIC OFFICERS.

Privilege of Candidate.—See LIBEL AND SLANDER.

PUBLIC SERVICE CORPORATIONS. See CORPORATIONS; EMINENT DOMAIN.

PUNITIVE DAMAGES. See EXEMPLARY DAMAGES.

QUESTIONS OF LAW AND FACT.

Carriers of Passengers.—*Negligence of Carrier's Servant.*—In the instant case the trial court properly referred to the jury the question of whether or not the baggage master was negligent in assisting plaintiff's husband and friends in lowering her from the baggage car. Walters *v.* Norfolk & W. Ry. Co., 149.

Intent.— See LARCENY.

Larceny.— See LARCENY.

Negligence.—See NEGLIGENCE.

RAILROADS.

Branch or Lateral Roads.—See *infra*, "Spur Track."

Corporation Commission.—See *infra*, "Spur Track."

Eminent Domain.—See EMINENT DOMAIN.

Fellow Servants.—See FELLOW SERVANTS.

Fires.—See FIRES.

Injuries on or near Track.—See MASTER AND SERVANT.

Nuisances.— *Railroads, Switch Yards, Repair Shops or Terminal Plant.*—Killam *v.* Norfolk & W. R. Co., 541.

Terminal Plant of Railroad.—Killam *v.* Norfolk & W. R. Co., 541.

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RAILROADS—Continued.

Nuisances—Continued.

The change of method of operating the terminal yards in the instant case consisted, in ultimate fact, in withdrawing the two tracks ascending the rising grade of the "hump" or embankment from their prior function of serving in part as tracks "for the reception, storing (and) retraining" of cars; and the subsequent use of such tracks for the "transportation" of cars of coal; but such transportation was essentially a rehandling—a retraining—a switching yard transportation. Such "transportation" of such cars necessarily occurs in all handling of through freight in switch yards. It was, in ultimate fact, a switching operation. Killam *v.* Norfolk & W. R. Co., 541.

Public Service Corporations.—See EMINENT DOMAIN.

Spur Track.—*Interstate Commerce.*—Under the above state of facts, the railroad interposed the defense that the Commission had no jurisdiction because the shipments proposed by the petitioner were interstate commerce. As, however, it appeared that the spur track facility was used indiscriminately by the company both for interstate and intrastate commerce and the restoration of the track, instead of constituting a burden upon interstate commerce, would be in aid of interstate commerce, and enable the company to do both classes of business more efficiently, the State Corporation Commission had jurisdiction over the complaint. If this defense be valid, then the commission is without jurisdiction to deal with any railroad facility located in this State, because practically all railway facilities are used both for interstate and intrastate commerce, just as this industrial spur track is to be used. Washington, Etc. Ry. *v.* Royster G. Co., 397.

The rights of shippers and the duties of the public cannot be determined by the consideration that the revenues derived by the railroad on shipments of interstate commerce were less than those on shipments of intrastate commerce. To admit such a proposition is to admit that the railroad has the right to discriminate against interstate commerce. Therefore, it was no defense in the instant case, that the railroad's freight revenue derived from petitioner's proposed shipments from a point without the State, would be less than if the shipments were transported over its own line from a point within the State. Washington, Etc., Ry. *v.* Royster G. Co., 397.

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RAILROADS—Continued.

Spur Track—Continued.

Pleading.—A petition was filed before the State Corporation Commission to compel the extension by the defendant railroad of an industrial spur track, which was originally constructed upon its right of way, but the extreme end of which, built on a wooden trestle, had been destroyed by fire and never rebuilt. It appeared from the evidence that the general public would be interested in the spur track, and that the track when constructed would not constitute merely a private switching facility for the sole benefit of the petitioner. The railroad had distinctly declined the offer made by the petitioner to bear the expense, and had refused to build the track upon any terms whatever. The prayer of the petition was that the railroad be required to extend and operate the siding, or that the petitioner be allowed to construct it and the railroad required to operate it. Held: That the order of the Commission requiring the work to be done entirely at the expense of the railroad, did not go outside of the issue as made up between the parties, even if it is conceded that the Commission, in proceedings of this character, can be held to strict rules of pleading as to the scope of the orders made by it. Washington, Etc., Ry. *v.* Royster G. Co., 397.

Private Benefit.—The petitioner constitutes a part of the public, and is entitled to facilities equal to those of his competitors in business, and the defendant company has no right to discriminate against its business by refusing to maintain the facility so long as it is needed to enable the defendant properly to discharge its public duties. The land was acquired by the railroad for the very purpose of maintaining this industrial spur track, and the evidence plainly indicated that it was necessary at the time it was constructed, and none the less necessary at this time. In refusing to rebuild and maintain this track in its entirety, the company plainly failed to discharge its duties. Washington, Etc., Ry. *v.* Royster G. Co., 397.

Switches.—See *infra*, "Spur Track."

What is a Railroad Company.— Wilson's Adm'x *v.* Va. Portland R. Co., 160.

REAL ESTATE BROKERS.

Action by Broker for Commission.—See *infra*, "Venue."

Commissions on Rented Property— *Sale of Property.*—Defendant, the owner of real property, entered into a verbal contract of indeterminate duration with plaintiff, whereby plaintiff agreed to lease the property for defendant at a

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REAL ESTATE BROKERS—Continued.

Commissions on Rented Property.—*Sale of Property*—Continued.

three per cent. commission. There was no express stipulation with reference to the collection of rent, yet, in point of fact, plaintiff effected a lease of the premises at $300 per month, which continued for sometime, and received the rent during the entire term, retaining the agreed commissions and paying over the residue to defendant. After the expiration of this lease, no new or different contract was made between plaintiff and defendant, but, with the latter's approval, a ten years' lease of the premises was entered into between plaintiff and another lessee at the same rental, and plaintiff collected two months' rent from the new tenant from which he deducted commissions as usual and paid the balance to defendant. The defendant then sold the property, thereby terminating plaintiff's agency. Plaintiff knew of defendant's intention to sell the property whenever a purchaser could be found, and interposed no objection when defendant informed him that he had given other agents an option to sell the property. Held: That the original contract of employment not being for a fixed time, or the agency coupled with an interest, defendant could revoke the powers of plaintiff at will and without incurring liability in damages therefor. Casey *v.* Walker, 465.

Venue.—Defendant, the owner of a farm, entered into a contract with plaintiff, a real estate agent, under which plaintiff was to receive a certain commission for negotiating the sale of defendant's farm at a certain price. The contract was entered into, signed and delivered in the city of Lynchburg, where plaintiff's real estate office was, and the farm was situated in Buckingham county, where plaintiff lived. Plaintiff obtained a purchaser for the farm, but at a lower price than that authorized by his contract with defendant, and a supplemental contract was entered into between plaintiff and defendant in Buckingham county, whereby defendant agreed to accept the lower price and plaintiff agreed to accept a smaller commission. Held: That the later agreement between the parties, entered into in Buckingham county, whereby the selling price and the commissions were changed, was merely a modification of the original agency contract; and, as the primary contract of agency was made in Lynchburg, at least a part of the cause of action arose there; and, as section 3215 of the Code of 1904 authorizes the bringing of an action "in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein," the Corpora-

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REAL ESTATE BROKERS—Continued.

Venue—Continued.

tion Court of the city of Lynchburg had jurisdiction of an action of assumpsit by plaintiff against defendant for his commission. Fitzgerald *v.* So. Farm Agency, 264.

Where Cause of Action Arises.—See *infra*, "Venue."

REAL PROPERTY. See DEEDS; ESTATES; MORTGAGES AND DEEDS OF TRUST; VENDOR AND PURCHASER.

Eminent Domain.—See EMINENT DOMAIN.

REASONABLE DOUBT.

Intoxicating Liquors.—In a prosecution under section 40 of the prohibition act, where the record of the express office and the affidavits of accused excluded every rational hypothesis of the innocence of the accused consistent with the evidence in the case, it is not error to refuse an instruction that the burden is upon the Commonwealth to prove beyond all reasonable doubt that the substance contained in the package delivered to the defendant was distilled spirits. Cochran *v.* Commonwealth, 801.

Reasonable Doubt as to Which of Two Persons Committed the Offense.—When two persons had the same opportunity to commit the offense, and if upon the whole evidence in the case there remains a reasonable doubt as to which of the two committed it, neither of the two can be convicted. Burton *v.* Commonwealth, 847.

Where it appeared from the record that there was evidence in the case which tended to show that the accused did not bring the liquor in question into this State or transport it from one point to another within the State; but that another person, not indicted and absent from the State at the time of the trial, brought the liquor into the State, it was error to refuse an instruction that if there was a reasonable doubt as to which of the two committed it, "neither of the two can be convicted," the instruction being the same in effect as if it had concluded, "the accused cannot be convicted," in lieu of the language, "neither of the two can be convicted." Burton *v.* Commonwealth, 847.

RECEIVERS.

Appointment.—The appointment of a receiver is not a matter of right but of discretion, to be governed by the circumstances of the case, one of which circumstance is the probability of the plaintiffs being ultimately entitled to a decree. It is, more-

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RECEIVERS—Continued.

Appointment—Continued.

over, a power always to be exercised with caution, and never except in a strong case. The general rule is to refuse an interlocutory application for a receiver, unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

In a suit to enforce the lien of judgments upon several parcels of real estate, the trial court refused to appoint a receiver of the property reported as liable for complainants' judgments, or to hold the parties in possession thereof liable for the use and occupation thereof. Two of the defendants were in good faith and upon reasonable grounds contesting the liability of the property owned by them to complainants' judgments, and the owners of the other property joined with the complainants in seeking to hold the property of these defendants liable, because if these properties were held liable they would probably produce sufficient to pay off and discharge the judgments, thereby relieving the property of such owners from any liability for the judgments. Held: That there was no error in the ruling refusing to appoint a receiver. The rights of the parties had not been determined at the time the receiver was asked for, nor had it been ascertained and adjudicated what property should be subjected to the discharge of such judgments. In such circumstances, the appointment of a receiver whereby the parties would have been divested of the possession of their property was not proper. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Creditor's Suits.—See *infra*, "Appointment."

Discretion of Court.—See *infra*, "Appointment."

RECORD.

Certification of Evidence.—See APPEAL AND ERROR.

Omission of Bills of Exception from Record.—See APPEAL AND ERROR.

Plea to the Jurisdiction.—Where defendant in due time filed its plea to the jurisdiction, and it was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, it became thereby as much a part of the record as the declaration itself. Bank of Bristol *v.* Ashworth, 170.

Striking from Record.—Where defendant in due time filed its plea to the jurisdiction and the same became a part of the record, it could only be expunged from the record on a mo-

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RECORD—Continued.

Striking from Record—Continued.

tion to strike out, and an order of the court, on an objection of plaintiff to the plea, not rejecting the plea, but merely holding that the plea was not good, cannot be held to have supplied the place of the necessary motion to strike out. If there had been a formal motion to reject, such a motion would have been inappropriate because the plea had already become a part of the record. Bank of Bristol *v.* Ashworth, 170.

If a plea or any other paper is filed by the clerk, either in vacation or in term, without authority of law, the mere filing of it does not make it a part of the record, and a motion may thereafter be made to reject, just as if it had never been filed; but when, as in the instant case, the plea is one which the law authorizes and requires to be filed at rules, it becomes essentially a part of the record, and requires as much certainty and positiveness of action to get it out as is required to bring something in which does not regularly belong in it. Before it was necessary for the plaintiff in error to bring the plea back into the record by a bill of exceptions, it was necessary for the defendant in error to take appropriate steps to strike it out. Bank of Bristol *v.* Ashworth, 170.

To construe an objection to a plea to the jurisdiction as a motion to strike out, would be to relax one rule of practice, highly technical it is true, merely to give the other party the benefit of another rule none the less technical, and that too to defeat a substantial right. Bank of Bristol *v.* Ashworth, 170.

An order of court holding that a plea to the jurisdiction was bad, is clearly a judgment upon the pleadings, and requires no exception to be stated in the order and no bill of exception to preserve the rights of the defendant thereunder, although a plea never authoritatively in the record, or being thus in is expressly stricken out, must be made the subject of a bill of exceptions, or an express order of the court, to make it a part of the record on appeal. Bank of Bristol *v.* Ashworth, 170.

RECORDING ACTS.

Contracts in Writing.—The bonds referred to in the preceding headnote did not on their face refer to the contract in pursuance of which they were given, nor to the minutes of the school board, but each of them stated that it was for payment on the house and lot bought of Rorer for school pur-

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RECORDING ACTS—Continued.

Contracts in Writing—Continued.

poses, and each bore an endorsement as follows: "For value received I assign the within bond to John B. Harding with permission to indulge until notified in writing to collect. (Signed) F. Rorer." Held: That the assignment of the bonds to John B. Harding by F. Rorer, signed by the latter, did not constitute a contract in writing between Rorer and the school board within the meaning of the recording acts. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Assuming that the burden of proof in the instant case was upon the trustees to show that the contract was by parol, where, however, the rights of parties are made apparent on the public records, and they have allowed upwards of thirty years to elapse before they have made any investigation of the records to ascertain their rights, and the beneficiaries of the property are represented by trustees who are public officers receiving but little, if any, compensation for their services, and where, after the lapse of many years, all of the parties representing the public interest have died, and the loss of other evidence may have been sustained as incident to the change in office of the trustees, it is not to be expected that those representing the public interest will be able to establish the rights of their beneficiaries by that clear and satisfactory evidence which might be expected and demanded of a private individual looking after his own interest. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Mortgages and Deeds of Trust.—See *infra*, "Recording in Two or More Places."

Notice to Purchaser.—See *infra*, "Subsequent Deeds by Grantor."

Recording in Two or More Places.—Section 3419, Code of 1904, provides that when a trustee removes from the State, or declines to accept the trust, or resigns, the circuit court of the county or the corporation court of the corporation, in which the deed or other writing creating the trust "is, or might have been recorded, may, on motion of any person interested, appoint a trustee" in the place of the trustee named in the instrument. A motion under this section shall be after reasonable notice to all parties interested in the execution of the trust other than the plaintiff in such motion. The deed in the instant case was properly recorded in the county of Prince George, the city of Hopewell not then being in existence. But after the incorporation of the city of Hopewell, the land conveyed by the deed of trust being situated in the city as incorporated, the deed of trust was

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RECORDING ACTS—Continued.

Recording in Two or More Places—Continued.

recorded in the clerk's office of the Corporation Court of the city of Hopewell. When the notes secured by the deed of trust became due, the creditors secured by the notes moved in the Corporation Court of Hopewell to substitute a new trustee for the original trustee on the ground that the original trustee had removed beyond the limits of the State. Held: That as the deed in question might have been recorded in the Corporation Court of the city of Hopewell in contemplation of law, as it was in fact recorded, that being so recorded at the time the proceeding in the instant case was instituted, the corporation court had jurisdiction of the subject matter of the proceeding, in so far as such jurisdiction depended upon the place of recordation of the deed of trust. Abrahams *v.* Ball and Others, 197.

There is no rule of law, statutory or otherwise, which prevents the valid subsequent recordation in other counties or cities of a deed once recorded in a given county or city. The circumstances that the *other* county or city is subsequently formed out of a portion of the county in which the deed was first recorded, and that it is not *necessary* to record the deed a second time in such *other* county or city, are immaterial. The original deed may be recorded in any county or city wherein the property embraced in the deed or any part thereof is located, and it will give the constructive notice provided for by said section 2465, Code of 1904. It is only when the original deed has been lost or mislaid that a certified copy thereof has to be used for the recordation thereof in another county or city. (Section 2506. Code of 1904). Abrahams *v.* Ball and Others, 197.

Subsequent Deeds by Grantor.—After a purchaser of land has put his deed to record he is not required to watch the records to ascertain whether thereafter other deeds by his grantor or judgments against him are docketed or recorded, and the same is true of deeds of trust conveying the land. The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

RECORDS.

Record of School Board.—See SCHOOLS.

RECOUPMENT. See SET-OFF, RECOUPMENT AND COUNTERCLAIM.

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REFORMATORIES.

Commitment of Minors.—Chapter 289, Acts 1910, page 434, in regard to the commitment of minors, is repealed by implication by chapter 350, Acts 1914, page 696. Ex-Parte Mallory, 298.

Commitment under Act of 1914.—If substantially the proceedings prescribed by chapter 350, Acts 1914, page 696, had been followed in the instant case, and if notice thereof had been given to the petitioner, the father of the children, the lower court would have had jurisdiction to proceed with the case and to have entered the order committing the children to the custody of the Children's Home Society of Virginia, and although there might have been error therein, such error could not have been inquired into or reviewed by the Supreme Court of Appeals in a proceeding by application for a writ of *habeas corpus*, but only by appeal from such order. Ex-Parte Mallory, 298.

Cruelty to Children.—See CRUELTY TO CHILDREN.

Custody of Children.—An order of the Juvenile and Domestic Court of the city of Richmond committed certain children to the Children's Home Society of Virginia. The children were not charged with any criminal offense when the order was entered, but only with being dependent and neglected children. They were taken from the home of the petitioner, their father, in *habeas corpus* proceedings, during his temporary absence, and the charge was inquired into and the order entered without any notice whatever to the father of the proceedings, or other procedure required by the statute in order to dispense with such notice. Held: That, because of the lack of such notice and in the absence of the other procedure required by the statute, the court below had no jurisdiction to hear and determine the case, and hence the said order was void as against the petitioner and his legal right to the custody of his children. Ex-Parte Mallory, 298.

REPORT OF COMMISSIONER. See APPEAL AND ERROR.

RESCISSION, CANCELLATION AND REFORMATION.

Fraud and Deceit.—Fraud does not render contracts and other transactions absolutely void but merely voidable, so that they may be either affirmed or repudiated by the party who has suffered the wrong. If he elects to repudiate and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position as

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RESCISSION, CANCELLATION AND REFORMATION—Continued.

Fraud and Deceit—Continued.

though the transaction had not taken place and by doing equity to the defendant as well as to the plaintiff. Gathright *v.* Fulton, 17.

Partnership Contract.—See PARTNERSHIP.

RES GESTAE.

Assault and Battery.—A witness testified that when he arrived at defendant's house, defendant's small boy ran out of the house crying, turned immediately and ran back inside and exclaimed, "Don't Father! Don't Father!" and came right out again, saying "Father is beating mother." Held: That this testimony as to the spontaneous and simultaneous outcry of the little boy was clearly admissible as part of the *res gestae*. Taylor *v.* Commonwealth, 886.

RESIDENCE. See DOMICILE.

RES IPSA LOQUITUR. See CARRIERS OF PASSENGERS.

RES JUDICATA. See FORMER ADJUDICATION OR RES ADJUDICATA.

REVIVAL OF ACTION. See ABATEMENT, REVIVAL AND SURVIVAL.

SALES. See VENDOR AND PURCHASER.

Agency.—See AGENCY.

Bills, Notes and Checks.—See *infra*, "General Issue."

Commission Merchants.—See FACTORS AND COMMISSION MERCHANTS.

Contract to Insure.—When the vendor of property on credit effects insurance upon it in pursuance of the contract of sale, the insurance is collateral security for the payment of the debt and the vendor must credit the debt by whatever amount he may realize from such insurance if not in excess of the debt, and if in excess of the debt, the residue must be paid over by the vendor to the vendee. And this is true whether the insurance be of property or only of the vendor's insurable interest therein. Camp *v.* Christo Mfg. Co., 439.

If the vendor effects, for his own benefit, insurance on the property sold, independently of any contract with the vendee on the subject, the latter is entitled to no benefit from the insurance. Camp *v.* Christo Mfg. Co., 439.

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SALES—Continued.

Contract to Insure—Continued.

Where there is a contract between vendor and vendee containing a covenant with respect to insurance, the insurance taken out while such contract is in force will be presumed to have been effected in pursuance of the contract, in the absence of evidence to the contrary. Camp *v.* Christo Mfg. Co.. 439.

Delivery of Goods.—See *infra*, "Duty of Purchaser upon Repudiation of Contract by Seller."

Duty of Purchaser upon Repudiation of Contract by Seller.—Under the circumstances set forth in the preceding syllabus, the refusal of the plaintiffs to ship the carload of machinery ordered by the defendants relieved the defendants of the need to go through the useless performance of giving any further order. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Factors and Commission Merchants.—See FACTORS AND COMMISSION MERCHANTS.

Distinction between Contract of Sale and Consignment of Goods to a Factor.—See FACTORS AND COMMISSION MERCHANTS.

Fire Insurance.—See *infra*, "Contract to Insure."

General Issue.—In an action at law by motion to recover the amount of certain promissory notes executed by the defendants in favor of the plaintiff, the defense relied on was that the notes evidenced but a part of a certain contract of sale in writing between the plaintiff and defendants executed by them at the same time the notes were executed: that the plaintiff in pursuance of the contract insured its interest in the subject of the sale against loss by fire, and upon its loss by fire collected the insurance, which the defendants were entitled to have credited on the indebtedness evidenced by the notes, but which the plaintiff refused to so credit. Although the notes, and not the contract, were sued on upon the face of the notice of motion, the testimony introduced by the plaintiff itself disclosed that the notes constituted a part of a written contract between the parties, all entered into at one and the same time. Hence, the action on the notes was an action on the written contract also and the general issue involved the question of what was that contract and the effect of it upon the obligation of the notes; therefore, the defense above stated was provable and could be relied on by the defendants under their plea of the general issue, and no special plea was necessary to put such defense in issue. Camp *v.* Christo Mfg Co., 439.

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SALES—Continued.

Insurance.—See *infra*, "Contract to Insure."

Mutuality of Obligation.—Plaintiffs assured defendants that if they would expend the necessary time and incur the necessary expense in making a canvass of certain territory to press the retail sale of plaintiffs' machinery during the year 1915, that plaintiffs would fill all orders defendants might in 1915 give for machinery at certain wholesale prices, and defendants should have the exclusive right to sell plaintiffs' machinery in said territory so long as they had on hand unsold goods. Accordingly, defendants made special efforts to sell plaintiffs' machinery and expended time and money in canvassing the territory and ordered of plaintiffs a carload of the machinery, which plaintiffs refused to furnish. Held: That there was a meeting of the minds of plaintiffs and defendants upon a contract by which the plaintiffs agreed to sell and deliver to the defendants such machinery as defendants might make retail sale of and order of plaintiffs in the year 1915, and there was a binding obligation on the part of the defendants to take and pay for such machinery, so as to create a mutuality of obligation in the premises. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Plea.—See *infra*, "General Issue."

Special Selling Factor Appointment.—See FACTORS AND COMMISSION MERCHANTS.

SCHOOL DISTRICTS.

Recovery of Money Belonging to County Retained by Treasurer.—See COUNTIES.

SCHOOLS.

Documentary Evidence.—See *infra*, "Record of School Board."

Purchase of Real Estate.—Acts 1874-5.—The act of 1874-5, page 190, providing that contracts for the purchase of real estate by public officers must be in writing, and the evidence of title must be submitted to the county court or judge for confirmation and approval, and that no contract should be valid until the title to such real estate was approved, was not enacted for the benefit of vendors of land, but to prevent the loss of public funds by investment in property the title to which was defective. It is true that it declares that the contract shall not be valid unless and until the title to the land "be thus approved," but this does not necessarily mean that the contract shall be void. The statute, like the statute of

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SCHOOLS—Continued.

Purchase of Real Estate.—Acts 1874-5—Continued

frauds, does not go to the existence of the contract, but makes written evidence necessary to evidence it. Moreover, like the statute of frauds, the right to demand compliance with the statute is a matter personal to the parties to the contract and their privies, and cannot be insisted upon by third persons. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

In the instant case it was insisted that as the contract was not in writing and as the evidence of title was not submitted to the judge, as required by the act, the school board was not bound by it, and hence there was a lack of mutuality of right and obligation, and that, where this is lacking when the contract is entered into, no subsequent act or omission of the parties can supply its place. Held: That as parol contracts for the sale of land were valid in 1876, by parity of reasoning to cases arising under the statute of frauds, the fact that the contract was not in writing and the title to the land was not approved by the court or judge, furnishes no valid reason why the contract might not be enforced, in a proper case, against Rorer, who labored under no disability to contract. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Record of School Board.—The records of a school board are books of original entry and are admissible in evidence to show the acts of the board with reference to the purchase of property by it. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Vendor and Purchaser.—See *infra*, "Purchase of Real Estate."

SEARCHES AND SEIZURES.

Admissibility of Evidence Illegally Obtained.—A person legally arrested and in the custody of the law on a criminal charge may be subject to a personal search and examination, even though against his will, for evidence as to his criminality, and, if found, it may be seized without violating his constitutional rights. And if any person, even by illegal seizure, procure possession of any article, instrument, or document, the State may, notwithstanding such illegal seizure, use it, if necessary, as legitimate evidence against the person from whom it was so obtained to convict him of a crime, or upon an investigation against such person before a grand jury, it being an established rule that the court can take no notice of how such evidence was obtained, whether originating from a legal or an illegal source. Lucchesi *v.* Commonwealth, 872.

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SEARCHES AND SEIZURES—Continued.

Admissibility of Evidence Illegally Obtained—Continued.

Before the accused who was charged with violation of the prohibition law was arraigned, he petitioned the court to restore to him the suit case and the ardent spirits contained therein, which were taken from him by the policemen upon his arrest; a motion to like effect was made at the trial before the jury were sworn; and again, while the Commonwealth was introducing its evidence in chief, he objected to introduction of the evidence that the suit case contained such ardent spirits. Held: That such evidence was admissible. Lucchesi *v.* Commonwealth, 872.

SECOND TRIAL. See APPEAL AND ERROR.

SELF-DEFENSE. See HOMICIDE.

SERVICE OF PROCESS.

Corporations.—In the certificate of incorporation of the defendant company, the place wherein its principal office was to be located was designated as "Hopewell, Prince George county, Virginia." Afterwards the community known as Hopewell was severed from the county and incorporated as the city of Hopewell. Held: That the severing of the territory from the county of Prince George, just as it changed the citizenship of every natural person then domiciled within the area thus severed, so it also changed the location of the principal offices of all corporations which were located within that area. And if defendant corporation's principal office was located in the territory incorporated as the city of Hopewell, the Corporation Court of that city had jurisdiction of an action against it. Builders Supply Co. *v.* Piedmont L. Co., 225.

Section 14 of chapter 1 of the act concerning corporations (Acts 1902-04, chapter 442 [Code 1904, section 1105-a, subdivision 14] as amended by Acts 1910, chapter 35) requires every corporation of a certain class, where all of its officers and directors are non-residents of the city or county where its principal office is located, to appoint an attorney in fact residing in such city or county, upon whom all legal process against the corporation may be served, and provides that if the company fails to appoint such attorney in fact, then all legal process against the corporation may be served upon the clerk of the court of such county or city wherein is located such principal office, having jurisdiction of such action or proceeding. Held: That under this statute returns of service of process against such corporations upon the clerk

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SERVICE OF PROCESS—Continued.

Corporations—Continued.

should affirmatively show that the principal office of the company sued is within the county or city in which the action is instituted, for the rule is that where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized and prescribed must be strictly followed, or the service will be invalid and the judgment rendered thereon by default void. However, returns defective in this respect may be amended to show the jurisdictional fact even after judgment and removal on error to the Supreme Court of Appeals. Builders Supply Co. *v.* Piedmont L. Co., 225.

Foreign Corporations.—The mere fact that a defendant is a nonresident does not oust courts of general jurisdiction of their jurisdiction over him, if he is found and served with process within the territorial limits of such court's jurisdiction. A foreign corporation, however, cannot be said to be "found" within a jurisdiction in which it does no business and has neither agent nor property; and domestic courts have no power to render judgments against them without voluntary appearance. Bank of Bristol *v.* Ashworth, 170.

Place of Business of Corporation.—See *infra*, "Corporations."

SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Bill of Particulars.—The remedy of the plaintiffs to obtain further particulars of the set-off claimed by the defendants was by motion for a bill of particulars under section 3249 of the Code of 1904, and not by objection to the plea. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Construction of Statute Providing for Set-Off.—The loss of profit by defendants, on the sale of twenty-six manure spreaders, which they made before the breach by the plaintiffs of their contract to furnish defendants with the spreaders when ordered, was such damage as could be set-off under section 3298, Code of 1904. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Section 3298, Code of 1904, has been liberally construed in furtherance of its obvious policy which is to prevent a multiplicity of suits and as far as may conveniently be done to effectuate in one action complete justice between the parties. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Description of Claim.—See *infra*, "Specification of Set-Off."

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SET-OFF, RECOUPMENT AND COUNTERCLAIM—Continued.

Loss of Profit.—The loss of profit by defendants, on the sale of twenty-six manure spreaders, which they made before the breach by the plaintiffs of their contract to furnish defendants with the spreaders when ordered, was such damage as could be set-off under section 3298, Code of 1904. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Specification of Set-Off.—See *infra*, BILL OF PARTICULARS.

A plea of set-off which clearly described the set-off as consisting of loss of profits and set forth how and from what cause the loss of profits occurred described the set-off claimed by defendants so "as to give the plaintiffs notice of its nature" as required by section 3298, Code of 1904. Although the plea might have gone more into *particulars* as to several items of loss of profits, such as giving the names of the customers referred to, on loss of sales to whom the loss of profits alleged occurred, this would have added nothing to the description of *the nature* of the set-off claimed. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Unliquidated Damages.—If the amount of the claim of the defendant is so unliquidated that it cannot be ascertained by computation or calculation from definite data supplied by the evidence, and lies in mere opinion, as for instance, damages for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner; on a warranty for the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskillfully working raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury, such claim cannot be set-off under the statute, section 298, Code of 1904. But where the damages are to be assessed upon pecuniary demands and are determinable by computation or calculation from data supplied by the evidence, they are so far liquidated that they may be set-off under the statute in question. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Whether Plea One of Set-Off or Recoupment.—There were several contracts between the plaintiffs and the defendants, but where the special plea of defendants alleged facts from which the conclusion necessarily followed that the contract, out of the breach of which arose the set-off claimed by defendants, was a separate and distinct contract from that or those under which the indebtedness sued for by the plaintiffs arose, the plea was one of set-off under section 3298,

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SET-OFF, RECOUPMENT AND COUNTERCLAIM—Continued.

Whether Plea One of Set-Off or Recoupment—Continued.

Code of 1904, and not of recoupment under section 3299, Code of 1904. New Idea Co. *v.* R. M. Rogers & Sons, 54.

Facts held to constitute a plea one of set-off and not of recoupment. New Idea Co. *v.* R. M. Rogers & Sons, 54.

SPECIFIC PERFORMANCE.

Consideration of Contract.—See *infra*, "Contract."

Contract.—To justify the court in decreeing specific performance of a contract, the contract must be based upon either a valuable or a meritorious consideration, and its terms must be definite. There must be mutuality in both the obligation and the remedy, and the person seeking the relief must show himself to have been ready, desirous, prompt and eager in the assertion of his rights. Hoster's Comm. *v.* Zollman, 41.

Where in a suit for specific performance of a contract for the sale of land, the whole transaction, as it appeared from the bill and the contract, was involved in so much doubt and obscurity that it was impossible therefrom to ascertain just what the parties agreed to, specific performance of the contract will not be decreed. While parol evidence may be introduced to supply deficiencies in the description of the land, or to explain ambiguities in the agreement, such evidence cannot be introduced to supply the lack of an agreement, or by construction to alter or vary it and create a different agreement from that to which the parties have assented. In the case at bar the vendee was insane and two of the vendors were dead. The danger of any attempt to remove the obscurities apparent upon the face of the document by the parol evidence of strangers to the contract was, therefore, obvious. Hoster's Comm. *v.* Zollman, 41.

Definiteness of Contract.—See *infra*, "Contracts."

Description of Land.—See *infra*, "Sufficiency of Description of Land."

Discretion of Court.—Specific performance of contracts to convey real estate is not a matter of right, but of sound judicial discretion—not, indeed an arbitrary or capricious discretion, dependent upon the mere pleasure of the court, but of sound and reasonable discretion, governed by well established general rules and principles. When these general rules and principles do not furnish the solution of any particular case, then its determination must depend upon the peculiar circumstances of that case. Hoster's Comm. *v.* Zollman, 41.

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SPECIFIC PERFORMANCE—Continued.

Laches.—In a suit for specific performance the laches of the complainant will bar the relief. Thus, where more than thirteen years elapsed after the date of the contract sought to be specifically enforced, and there was no suggestion in the record as to the reasons for the delay in seeking its specific performance, such delay is a conclusive bar to relief. The parties to the contract must be construed to have mutually abandoned all right or claim thereunder. Hoster's Comm. *v.* Zollman, 41.

Mutuality of Obligation and Remedy.—See *infra*, "Contract."

Parol Evidence.—Where in a suit for specific performance of a contract for the sale of land, the whole transaction, as it appeared from the bill and the contract, was involved in so much doubt and obscurity that it was impossible therefrom to ascertain just what the parties agreed to, specific performance of the contract will not be decreed. While parol evidence may be introduced to supply deficiencies in the description of the land, or to explain ambiguities in the agreement, such evidence cannot be introduced to supply the lack of an agreement, or by construction to alter or vary it and create a different agreement from that to which the parties have assented. In the case at bar the vendee was insane and two of the vendors were dead. The danger of any attempt to remove the obscurities apparent upon the face of the document by the parol evidence of strangers to the contract was, therefore, obvious. Hoster's Comm. *v.* Zollman, 41.

Requisites of Contract.—See *infra*, "Contract."

Sufficiency of Description of Land.—The Chancery Court of the city of Richmond decreed specific performance of a written contract of sale between defendants and complainant, whereby defendants agreed to sell to complainant "that certain property situated in the city of Richmond, Virginia, 'No. 504 east Marshall street and all improvements thereon,' "—which the court ascertained fronted twenty-six feet on east Marshall street, and extended back at a right angle and between parallel lines 98.70 feet. From this decree defendants appealed. The sole question was, what property was embraced by the description. Defendants admitted the execution of the contract of sale, but claimed that they had in mind and only intended to sell the portion of the lot fronting on east Marshall street actually covered by the buildings. Complainant, on the other hand, examined the land books and records to identify the property designated as No. 504

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SPECIFIC PERFORMANCE—Continued.

Sufficiency of Description of Land—Continued.

east Marshall street, and these records and other testimony fully identified the property described in the contract of sale and fixed its dimensions as established by the decree under review. Held: That there was no error in the decree. Harper *v.* Wallerstein, 274.

In a city having a known system of notation, regulated by municipal laws and acted upon by every one, the description of premises in a deed or contract of sale by a number is sufficiently definite. Harper *v.* Wallerstein, 274.

SPUR TRACK. See RAILROADS.

STARE DECISIS. See "Law of the Case."

STATE CORPORATION COMMISSION. See CORPORATIONS.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTES. See MUNICIPAL CORPORATIONS.

Acts Passed at Same Session of Legislature.—See *infra*, "In Pari Materia."

Constitutional Law.—See *infra*, "Title," and see CONSTITUTIONAL LAW.

Construction.—See *infra*, "In Pari Materia;" "Practical Construction."

Repeal.—See *infra*, "Repeal."

Strict Construction.—See TAXATION.

In Pari Materia.—*Construction of Sections* 862 *and* 865, *Code of* 1904. Hechler's Ex'x *v.* Kemp, 528.

The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy and they are to be construed together as if parts of the same act. They should be construed, if possible, so as to harmonize, and force and effect should be given to the provisions of each. City of Richmond *v.* Drewry-Hughes Co., 178.

Practical Construction.—The rule of interpretation which permits the courts to look to the practical construction adopted by executive officers is usually applied to cases in which such construction has continued and been acquiesced in for a long

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STATUTES—Continued.

Practical Construction—Continued.

period of time; but it is not to be confined to such cases. One reason for the rule is that the officers charged with the duty of carrying new laws into effect are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the new law, and to have formed an independent, conscientious and competent expert opinion thereon. City of Richmond *v.* Drewry-Hughes Co., 178.

Repeal.—See *infra*, "Time of Taking Effect."

The question of the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in the instant case was expressly given by statute and had been exercised for many years. The real question is whether the former law has been repealed by implication by the segregation act, for it certainly has not been repealed thereby in express terms. Repeals by implication are not favored. But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive. City of Richmond *v.* Drewry-Hughes Co., 178.

Repeal by Implication.—Chapter 289, Acts 1910, page 434, in regard to the commitment of minors, is repealed by implication by chapter 350, Acts 1914, page 696. Ex-Parte Mallory, 298.

Subject.—See *infra*, "Title."

Time of Taking Effect.—*Abolition of Bill of Exceptions.*—The act of March 21, 1916 (Acts 1916, page 722), preserving bills of exception, was made an emergency act, and went into effect immediately and contained no repealing clause, whereas the act of March 21, 1916 (Acts 1916, page 708), abolishing bills of exception, was not an emergency act, and, by constitutional provision (Constitution 1902, section 53, article IV), did not take effect until ninety days after the adjournment of the legislature; and it expressly repealed all stat-

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STATUTES—Continued.

Time of Taking Effect—Continued.

utes in conflict with it. Consequently, there was no antagonism between the two statutes. The emergency act was operative at once, and continued in force during the interval between its passage and the time at which the act abolishing bills of exceptions took effect, when it was immediately repealed. Ellis *v.* Town of Covington, 821.

Title.—The act of March 6, 1900 (Acts 1899-1900, p. 944, chapter 864), is not void because violative of section 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title. The title of that act expressly states that it relates to the lien of the city for taxes assessed on real estate, and to the sale thereof for non-payment of taxes, and that a statute with such a title is sufficient to sustain the provision that the lien of the city for taxes shall be on the land and every interest therein is manifest. Powers *v.* Richmond, 328.

Construction of Constitutional Provision.—Although a statute refers to many things of a diverse nature, the title will be sufficient if the subordinate provisions of the statute may be fairly regarded as in furtherance of and as facilitating the accomplishment of the general object expressed in the title. The constitutional inhibition was not intended to hinder remedial legislation, nor to prevent the incorporation in a single act of the entire statutory law upon one general subject. There should be a liberal construction of the title so as to uphold the statute if practicable. Lucchesi *v.* Commonwealth, 872.

All the provisions in the prohibition act against the transportation of liquor are congruous and germane to the title, and the methods devised for the accomplishment of its general purpose. Lucchesi *v.* Commonwealth, 872.

Liberal Construction of Section 52, *Constitution of* 1902.—Section 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title, is to be liberally construed in determining whether an act is broader than its title; the act is to be upheld if practicable; and the title of an act is sufficient if the provisions of the act may be fairly regarded as in furtherance of the object expressed in its title. Cochran *v.* Commonwealth, 801.

All that is required by section 52 of the Constitution is that the subjects embraced in the statute, but not specified in the title, be congruous and have natural connection with

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STATUTES—Continued.

Title—Continued.

Liberal Construction of Section 52, Constitution of 1902—Continued.

or be germane to the subject expressed in the title, as instrumentalities for the accomplishment of the general purpose of the act. Cochran *v.* Commonwealth, 801.

Prohibition Act.—Section 39 of the prohibition act is not unconstitutional as violative of section 52 of the Constitution of Virginia, because the body of the act in regard to "transportation" of ardent spirits is broader than its title, in that the title is confined in its reference to "transportation" to "transportation for sale." Burton *v.* Commonwealth, 847.

The prohibition act (Acts 1916, chapter 146, page 215) is not unconstitutional, in that it violates section 52, Constitution of 1902, in so far as it prohibits, by section 40, the acceptance and receipt of ardent spirits. The regulation of the acceptance and receipt of ardent spirits by transportation is not only in furtherance of the "enforcement" of the act mentioned in its title, but may be said to be essential thereto. Cochran *v.* Commonwealth, 801.

The regulation of the bringing into this State and of transporting from one point to another within the State of ardent spirits is certainly germane and in furtherance of the "enforcement" of the statute in respect to its regulation of the use and its prohibition of the keeping of ardent spirits for sale. While this is not so obviously true of the prohibition of the sale of ardent spirits, falling under the ban of the statute, it is essentially true of that also. Without regulation of the transportation of ardent spirits, the illicit sale thereof cannot be efficiently prevented. Hence, such regulation may be said to be not only germane and in furtherance of the enforcement of the statute, but that it is essential to its enforcement. Burton *v.* Commonwealth, 847.

STOCK AND STOCKHOLDERS.

Corporations.—A corporation is a separate entity from its stockholders. Norfolk So. R. Co. *v.* Greenwich Corp., 631.

Taxation.—See TAXATION.

STREET RAILROADS.

Contributory Negligence.—See CROSSINGS.

Crossings.—See CROSSINGS.

Liability for Injuries.—A carrier is not an insurer of the safety of its passengers. Derring's Adm'r *v.* Virginia Ry. & P. Co., 517.

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STREET RAILROADS—Continued.

Right of Public to Use of Street.—The public has an equal right with the street railway company to ride, drive, and walk upon the street between crossings, subject, however, to the superior right of way of the street cars, due to the fact that such cars must run on the tracks and cannot observe the law of the road. Va. Ry. & P. Co. *v.* Boltz, 649.

Streets.—See *infra*, "Right of Public to Use of Street."

STREETS AND HIGHWAYS. See STREET RAILROADS.

STRIKING FROM RECORD. See RECORD.

SUCCESSIVE TRIALS. See APPEAL AND ERROR.

SUNDAYS AND HOLIDAYS.

Misdemeanor.—The act of Assembly, Acts 1916, page 751, re-enacting and amending section 3799, Code of 1904, makes the violation of the Sabbath day, as prohibited by the act, a misdemeanor, thereby changing the rule announced in *Wells* v. *Commonwealth*, 107 Va. 834, 57 S. E. 588, where it was held that under the former statute the transgression was not a misdemeanor, and the forfeiture thereby imposed could only be recovered by a civil warrant. Ellis *v.* Town of Covington, 821.

Sale of Coca-Cola.—A Sunday ordinance of the town of Covington was substantially in the language of the act of Assembly (Acts 1916, page 751) amending and re-enacting section 3799 of the Code of 1904, and provided that "If a person on the Sabbath day be found laboring at any trade or calling * * * except in household or other work of necessity, or charity, he shall be deemed guilty of a misdemeanor," etc. Held: That the sale of soft drinks, including Coca-Cola, on Sunday, from a soda fountain by the holder of a restaurant license, was a plain violation of the ordinance. The defendant could not lawfully dispense soft drinks, even on a week-day, without license; and plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability under the ordinance. Ellis *v.* Town of Covington, 821.

SUPERVISORS. See COUNTIES.

SURVIVAL OF ACTION. See ABATEMENT, REVIVAL AND SURVIVAL.

SWITCHES. See RAILROADS.

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SWITCH YARDS. See EMINENT DOMAIN.

TAXATION.

Assessment.—See *infra*, "Correcting Assessment."

Bank Stock.—See *infra*, "Bank Stock."

Excessive Rate.—The board of supervisors of a county levied a district road tax of forty cents on the one hundred dollars and a county road tax of fifteen cents on the one hundred dollars value of real and personal property situate in a certain magisterial district of the county. The Code of 1904, section 944-a, sub-section 12, provides that before a road tax exceeding a total of fifty cents on the one hundred dollars worth of property shall be levied, the question of such tax shall be submitted to the people of the county or district affected. In the instant case, the question was not submitted to the people, but as the entire tax was to be applied to county and district road purposes, there was no difficulty in separating the illegal excess from the authorized tax, and therefore a judgment of the circuit court of the county exonerating plaintiffs from the excess was not erroneous. Turnbull *v.* Brunswick Co., 645.

Life Tenant and Remainderman.—Under section 465, Code 1904, property is properly assessed for taxation in the name of the life tenant, and when so assessed the taxes constitute a lien on the property. Powers *v.* Richmond, 328.

Bank Stock.—Code of 1904, sections 567 and 571, provide that any person assessed with State and local taxes, who is aggrieved by any such assessment may proceed by motion for the correction of any assessment which is erroneous. As under sections 17 to 22 of the revenue law, Code of 1904, appendix, providing for the taxation of bank stock, it clearly appears that the tax is a tax against the individual stockholder and not against the bank, and that the bank, as such, is in no event responsible for the tax unless it has funds of the stockholder in its possession out of which the tax can be paid, the bank cannot proceed under sections 567 and 571, Code of 1904, for relief against an alleged erroneous assessment of State and local taxes upon the stock of the bank, but the remedy of each stockholder, however, is clear under sections 567 to 571, inclusive. This remedy is complete and effective. Main St. Bank *v.* Richmond, 574.

Choses in Action.—See *infra*, "Trusts and Trustees."

Constitutional Law.—See MUNICIPAL CORPORATIONS.

Uniformity.—See *infra*, "Uniformity."

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TAXATION—Continued.

Construction.—See *infra*, "Strict Construction."

The question of the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in the instant case was expressly given by statute and had been exercised for many years. The real question is whether the former law has been repealed by implication by the segregation act, for it certainly has not been repealed thereby in express terms. Repeals by implication are not favored. But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive. City of Richmond *v.* Drewry-Hughes Co., 178.

Repeal of Statutes.—See *infra*, "Repeal of Statutes."

Strict Construction.—See *infra*, "Strict Construction."

Correcting Assessments.—See *infra*, "Bank Stock."

Code Provides Adequate Remedy.—Section 571 of the Code of 1904 provides a satisfactory and adequate remedy for the individual taxpayer, and section 841 of the Code provides an ample remedy in all cases in which the citizens of the entire county or of any district feel themselves aggrieved by an alleged illegal tax. Turnbull *v.* Brunswick Co., 645.

Correction by Court.—In the case at bar objection was made to the fact that the assessment was made by the commissioner of the revenue upon information derived from the examiner of records, instead of by making inquiry of the taxpayer. If any error was made in this respect to the prejudice of the plaintiff in error, he had ample opportunity to have it corrected by the circuit court, which had power to examine into the matter and to do all that the commissioner of the revenue had power, or was required, to do in the premises under the tax laws of this State. Wise and Others *v.* Commonwealth, 693.

Excessive Rate.—If a local tax, legal and regular in other respects and designated for a single purpose, is levied in excess of the authorized rate, the tax is not thereby rendered invalid as to the whole amount, but only as to the excess. Turnbull *v.* Brunswick Co., 645.

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TAXATION—Continued.

Correcting Assessments—Continued.

Injunction.—Prior to February 24, 1916, the jurisdiction of courts of equity to restrain an illegal or unauthorized tax was well settled in this State. The jurisdiction having once attached, it will survive until destroyed by express statutory enactment and the mere fact that an adequate remedy at law has been provided by statute does not defeat the jurisdiction. Commonwealth *v.* Tredegar Co., 506.

Injunction Refused.—In the instant case the examiner of records for the judicial circuit embracing the city of Richmond reported to the local board of review for that city certain capital alleged to have been omitted from the tax returns of the complainant. At a hearing before the local board of review, the local board rejected the report of the examiner of records, and instructed the commissioner of revenue not to extend the tax upon his books. Thereupon, the Auditor of Public Accounts, with the approval of the State Tax Board, issued written instructions to the commissioner of revenue directing him to disregard the action of the local board and to make the assessment of the alleged omitted capital in accordance with the report of the examiner, which the commissioner did. The complainant then brought this suit in equity for the ultimate and principal purpose of enjoining and restraining the collection of the taxes assessed by the commissioner of revenue. The gist of the proceeding, plainly shown by the prayer of the bill, is to correct and cancel the assessment, to exonerate the complainant from the tax, and to perpetually enjoin its collection. Precisely this relief was available to the complainant by a simple motion at law, under sections 567, 568 and 569 of the Code of 1904. Held: That the act of February 24, 1916, which provides, "that no suit for the purpose of restraining the collection or assessment of any tax, State or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law," is conclusive of the instant case. Every possible defense against the assessment which is raised in the equity suit could have been equally availed of in the motion under the statute. Commonwealth *v.* Tredegar Co., 506.

Remedy.—It was contended in the instant case that the only course open to the Commonwealth, after the local board of review had rejected the report of the examiner of records, was an appeal to the Hustings Court of the city of Richmond, and that the subsequent action of the Auditor and the commissioner was null and void. This is a debatable proposition, but even conceding that the contention is sound in so

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TAXATION—Continued.

Correcting Assessments—Continued.

Remedy—Continued.

far as the validity of the assessment in question may depend upon the action of the examiner and of the board of review, if the assessment is right in substance, it can be upheld as an independent assessment made by the commissioner under the instructions of the Auditor, without any action on the part of the examiner of records or the board of review. Commonwealth *v.* Tredegar Co., 506.

Under section 508 of the Code of 1904, it is the duty of the commissioner of the revenue to assess for taxation any property which he finds has not been assessed for taxation for any of the previous years within the limits prescribed by that section. If he makes an erroneous or an illegal and invalid assessment, the remedy under section 567 of the Code is adequate, and the previously existing remedy by injunction is cut off by the act of February 24, 1916. The remedy by motion under the statute is prompt and simple, and is peculiarly adapted to a fair and just settlement of disputes of this character between the Commonwealth and its citizens. Commonwealth *v.* Tredegar Co., 506.

Due Process of Law.—The act of March 6, 1900 (Acts 1899-1900, p. 944, chapter 864), providing that the lien of the city of Richmond for taxes shall be on the land and every interest therein, is not unconstitutional as violating the fourteenth amendment of the Constitution of the United States. Where a tax is levied on property according to its value, the law must afford an adequate method for the correction of errors, and where this is done it constitutes due process of law, and the due process clause of the fourteenth amendment is satisfied if an opportunity be given to all those who are interested to question the validity of the amount of the tax either before that amount is ascertained, or in subsequent proceedings for its correction. Powers *v.* Richmond, 328.

Erroneous Assessment.—See *infra*, "Correcting Assessments."

Estate for Life.—A gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income. Wise and Others *v.* Commonwealth, 693.

Excessive Rate.—See *infra*, "Correcting Assessments."

Gift of Income.—See *infra*, "Estate for Life."

Illegal Taxes.—See *infra*, "Correcting Assessments."

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TAXATION—Continued.

Injunction.—Jurisdiction of equity to restrain an illegal or unauthorized tax. Commonwealth *v.* Tredegar Co., 506.

Lien for Taxes.—See MUNICIPAL CORPORATIONS.

Life Estate.—See *infra*, "Assessment;" "Estate for Life."

Merchants.—See MUNICIPAL CORPORATIONS.

It has been the policy of our law for years to impose a license tax on merchants as the exclusive method of State taxation, and to permit a property or *ad valorem* tax thereon by localities. It is not surprising, therefore, to find that the General Assembly, in launching a new but tentative and partial segregation plan of taxation, should have refrained from disturbing the status of the tax laws as to this particular property. A judicial construction in keeping with this natural and probable legislative purpose avoids conflict, and harmonizes all the provisions of the law enacted on the subject at the extra session of 1915, and its effect is to take from the general class of intangible personal property segregated to the State, the capital of merchants and to place it, as heretofore, in a class to itself. City of Richmond *v.* Drewry-Hughes Co., 178.

The capital of merchants was not intended to be embraced in schedule C of the tax bill. While such capital might, upon a casual reading, appear to be included in that classification, yet when sections 8 and 9 of the schedule are read in connection with other provisions of the tax laws, particularly the segregation act itself and section 46 of the tax bill, it is clear that the capital of merchants was not intended to be embraced within this classification, but that the same is expressly excepted and excluded therefrom. City of Richmond *v.* Drewry-Hughes Co., 178.

Municipal Corporations.—See MUNICIPAL CORPORATIONS.

Non-Resident Trustee.—See *infra*, "Trusts and Trustees."

Remedy.—See *infra*, "Correcting Assessments."

Repeal of Statutes.—The question of the right of the city of Richmond to impose upon the capital of merchants an *ad valorem* tax in excess of thirty cents on the one hundred dollars of assessed valuation is not one of an original grant of power to tax, to which the rule of *strictissimi juris* applies. It is unquestioned that the power to levy the tax complained of in the instant case was expressly given by statute and had been exercised for many years. The real question is whether the former law has been repealed by implication by the segregation act, for it certainly has not been repealed thereby

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TAXATION—Continued.

Repeal of Statutes—Continued.

in express terms. Repeals by implication are not favored. But there is always a presumption more or less strong, according to circumstances, that a statute is not intended to repeal a prior statute on the same subject, unless it does so in express terms. In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal them by subsequent general legislation is so strong as to be almost conclusive. City of Richmond *v.* Drewry-Hughes Co., 178.

Situs of Property.—See *infra*, "Trusts and Trustees."

It is the policy of this Commonwealth to impose taxes on all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbol by which such property is evidenced. Wise and Others *v.* Commonwealth, 693.

Stock and Stockholders.—See *infra*, "Bank Stock."

Strict Construction.—A tax must be plainly authorized before the citizen can be charged therewith. City of Richmond *v.* Drewry-Hughes Co., 178.

It is undoubtedly true as a general proposition, that taxes must be plainly authorized before they can be collected; but this rule does not go to the extent of cutting off and shutting out all the lights that may be reasonably brought to bear in determining the intention of the law-making power. City of Richmond *v.* Drewry-Hughes Co., 178.

Trusts and Trustees.—Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a non-resident trustee, the State can levy a tax on such fund, although such choses are not, and never have been, within the State, and the trustee is and always has been a non-resident of the State. Brooklyn Trust Co. *v.* Booker, 680.

Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts 1897-8, page 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treas-

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TAXATION—Continued.

Trusts and Trustees—Continued.

ury. And it is immaterial whether the trustee received his appointment from a court of this State, or his appointment is the voluntary act of the parties in or out of the State. Wise and Others *v.* Commonwealth, 693.

Uniformity.—As merchants' capital is not embraced in the classification of schedule C of the tax bill, but remains where it has practically always been, in a class to itself, subject to a license tax only by the State but liable to a local property tax, and the propriety and legality of such a classification has been too long recognized in this State to admit of serious question, and is, moreover, plainly authorized by section 169 of the Constitution of 1902, therefore, there is no force in the contention that if this construction is correct, the segregation act itself is unconstitutional because it violates section 168 of the Constitution of 1902, requiring uniformity in taxation. City of Richmond *v.* Drewry-Hughes Co., 178.

There can be no question about the power to tax different classes of intangible property at different rates. A contrary holding would strike a fatal blow to the entire plan of taxation as established by the General Assembly in 1915 (see section 9 of the tax bill); and would, furthermore, be contrary to the settled law on the subject. City of Richmond *v.* Drewry-Hughes Co., 178.

TELEGRAPHS AND TELEPHONES.

Interstate Commerce.—*Action of Congress Exclusive.*—By act of June 18, 1910, amending an act to regulate commerce (chapter 309, 36 Statutes at Large, 539), Congress has undertaken to occupy the field of interstate commerce by telegraph; and has declared that as to all such business, telegraph, telephone and cable companies are common carriers within the meaning and purposes of the act. The act further prescribes that with respect to that class of business telegraph companies shall print and publish rates, rules, classifications, regulations and practices, and file the same with the Interstate Commerce Commission; and confers upon that tribunal jurisdiction to determine what rates, etc., are just and reasonable. This action on the part of Congress is exclusive, superseding State laws on the subject, and of course is controlling upon State courts. Williams & Sons *v.* Postal, etc., 675.

Unrepeated Message.—Congress having permitted telegraph companies to classify their interstate messages into repeated and unrepeated messages, and charge different rates

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TELEGRAPHS AND TELEPHONES—Continued.

Interstate Commerce—Continued.

Unrepeated Message—Continued.

therefor, a regulation of such a company of which the sender of the telegram has notice, limiting the liability of the company on unrepeated interstate messages to the cost of the message is reasonable and will be enforced. Williams & Sons *v.* Postal, etc., 675.

Plaintiff brought his action against the defendant telegraph company for failure through carelessness and neglect to deliver a telegram to plaintiff promptly, in consequence of which plaintiff suffered a loss. The telegram was an interstate message and was unrepeated; and the blank upon which it was written contained the usual stipulation that it was sent "subject to the terms on the back thereof, which are nereby agreed to." These terms contained, among others, the following clause: "The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated telegrams, beyond the amount received for sending the same." Held: That the telegraph company was not liable. Williams & Sons *v.* Postal, etc., 675.

Unrepeated Message.—See *infra*, "Interstate Commerce."

TENANCY FROM YEAR TO YEAR. See LANDLORD AND TENANT.

TERMINAL PLANT. See EMINENT DOMAIN.

THREATS.

Homicide.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction: "The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned." Green *v.* Commonwealth, 862.

Instructions.—In a trial for murder where the defense of accused was justifiable homicide in defense of his mother, it was error to refuse the following instruction: "The court instructs the jury that if they believe that threats were communicated, which he believed, it is immaterial whether the threats were true or false, so far as their influence upon the action of the prisoner is concerned." Green *v.* Commonwealth, 862.

TIME OF FILING.

Pleading.—See PLEADING.

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TREASURER. See COUNTIES.

TREES AND TIMBER.

Lease of Lumber Lands.—See LANDLORD AND TENANT.

TRESPASS.

Eminent Domain.—A railroad company is no less a trespasser when it diminishes the water power of a mill owner because it intended to exercise its right of eminent domain than if it entertained no such intention. Norfolk & W. R. Co. *v.* Allen, 603.

In such a case every time it diminished the plaintiffs' supply of water to their detriment it committed a new trespass, and while the nature of its pumping station indicated that it would probably continue to trespass upon the plaintiffs' property, the latter were under no obligation to presume that it would continue to do so, without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them. Norfolk & W. R. Co. *v.* Allen, 603.

Mitigation of Damages.—See DAMAGES.

TRESPASS ON THE CASE.

Assumpsit or Trespass on the Case.—See ASSUMPSIT.

TRIAL.

Arguments of Counsel.—See ARGUMENTS OF COUNSEL.

Witnesses.—See WITNESSES.

TRUST DEED. See MORTGAGES AND DEEDS OF TRUST.

TRUSTS AND TRUSTEES. See MORTGAGES AND DEEDS OF TRUST.

Charities.—See CHARITIES.

Removal and Substitution of Trustees.—See MORTGAGES AND DEEDS OF TRUST.

The proceeding under section 3419, Code of 1904, to substitute a new trustee for the original trustee named in the instrument creating the trust, is a statutory one and the express requirements of the statute must be at least substantially complied with in order that the court may have the jurisdiction of the subject matter conferred by the statute. Abrahams *v.* Ball and Others, 197.

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TRUSTS AND TRUSTEES—Continued.

Resort to Court for Direction and Advice.— See EXECUTORS AND ADMINISTRATORS.

Taxation.—Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a non-resident trustee, the State can levy a tax on such fund, although such choses are not, and never have been, within the State, and the trustee is and always has been a non-resident of the State. Brooklyn Trust Co. *v.* Booker, 680.

Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of twenty-one years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts 1897-8, page 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. And it is immaterial whether the trustee received his appointment from a court of this State, or his appointment is the voluntary act of the parties in or out of the State. Wise and Others *v.* Commonwealth, 693.

VARIANCE.

Joint Promise.—The owner of property, through her agent, leased the property to a corporation. Before the lessee corporation took possession under the lease its stockholders determined to dissolve the corporation, and the agent of the lessor was notified that the property would not be occupied under the lease. The lessor claimed that one of the stockholders of the corporation verbally promised the plaintiff's agent that he and the two other stockholders of the corporation would be responsible for the rent until another tenant could be found for the property. The lessor then brought suit against the stockholders as individuals upon the joint promise of the stockholders to be responsible for the rent. Held: That the trial court properly instructed the jury that unless the promise was made jointly by all of the defendants, the plaintiff could not recover jointly against all, and the evidence failing to establish such joint promise, the court committed no error in setting aside a joint verdict against all the defendants. Friedlin *v.* Crockin, 521.

Larceny.—See LARCENY.

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VARIANCE—Continued.

Venire Facias.—A writ of *venire facias* directed the officer to summon sixteen persons for the trial of "James and Wesley Green," and the return so described the defendants, while the indictment designated them as "James Green and Wesley Green." After the defendants had elected to be tried separately, a second, or supplemental, writ of *venire facias* directed the sheriff to summon two other persons for the trial of "James Green," and for these alleged variances there was a motion to quash both writs. Held: That these writs in all essential particulars complied with the statute, and the supposed discrepancy in the description of the defendants in the indictment and writs is immaterial, and could in no way have prejudiced their rights. Green *v.* Commonwealth, 862.

VENDOR AND PURCHASER. See SPECIFIC PERFORMANCE

Adequate Remedy at Law.—See *infra*, "Deficiency in Quantity of Land."

Deficiency in Quantity of Land.—Courts of equity have jurisdiction to render decrees for the value of the deficiency in the quantity of land sold by the acre. The basis of this jurisdiction is either mutual mistake, or the mistake of one party occasioned by the fraud or culpable negligence of the other. The jurisdiction being elementary, it is immaterial that the complainant has a complete and adequate remedy at law. Austin *v.* Sanders, 209.

Complainant brought his suit in equity to recover for a deficiency in quantity of a tract of land sold by defendant to complainant. The tract of land in question had been placed in the hands of one L. for sale, who negotiated the sale to complainant and was complainant's partner in the purchase. The evidence did not show that there was any misrepresentation on the part of the defendant as to the quantity of land in the boundary conveyed. It appeared that all the misrepresentations with reference to the quantity of land were made by L., either before he became the agent of defendant, or at the time or after he became a partner of complainant, so that the latter misrepresentations were of one partner to another, for which complainant could not be held responsible. The deed was silent as to the quantity of land that was in the boundary, and the record did not show that defendant was responsible for the statements made by L. as to the quantity of land in the boundary. Held: That the evidence did not show that the sale was expressly or impliedly a sale by the acre. Austin *v.* Sanders, 209.

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VENDOR AND PURCHASER—Continued.

Description of Land.—In a city having a known system of notation, regulated by municipal laws and acted upon by every one, the description of premises in a deed or contract of sale by a number is sufficiently definite. Harper *v.* Wallerstein, 274.

The object of a description of land sold or conveyed in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold—that it rarely does or can do, without helping evidence— but to furnish the means of identification; when that is done it is sufficient. That is certain which can be made certain, and evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. Harper *v.* Wallerstein, 274.

Equity.—See *infra*, "Deficiency in Quantity of Land."

Judgment Liens against Vendor.—*Extent of Lien of Judgment against Vendor.*—Where a valid contract for the sale of land has been entered into, and the recording acts do not interfere, a judgment against the vendor after the contract and before deed to the purchaser, and before the entire purchase money has been paid, is a lien on the land only to the extent of the purchase money then unpaid. Overruling *Fulkerson* v. *Taylor*, 102 Va. 314, 46 S. E. 309, so far as it declares that "in order for a purchaser under a contract which is not required to be recorded, to be protected as to subsequent judgments against his vendor, he must, before the date of such judgment, have become invested with a perfect equitable title." McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Parol Contract for Purchase of Land.—Where the registry acts do not apply to a parol contract for the sale of land, and where the vendee has paid all the purchase money and has been put into possession so that he has a valid equitable title to the land, it is not subject to the lien of a judgment subsequently recovered against the vendor. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

In 1876 the trustees of a school district purchased a house and lot from one Rorer upon the following terms: The trustees to pay Rorer $2,500 for the lot and Rorer to take "the school house and lot on the hill" at $500 in part payment, and the residue in equal payments in one and two years. The trustees then canvassed the town for private subscriptions, and obtained good solvent subscribers to the amount of $1,220. The board then accepted Rorer's proposition and issued its bonds for $800, which, together with the house and

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VENDOR AND PURCHASER—Continued.

Judgment Liens against Vendor—Continued.

Parol Contract for Purchase of Land—Continued.

lot on the hill and the private subscriptions, made up the price agreed. The school trustees took possession of the property thus purchased and a few years thereafter expended $2,000 in adapting it to school purposes. They appear also to have delivered possession of the house and lot on the hill to Rorer. No deed was made by Rorer to the trustees nor by the trustees to Rorer, but the bonds given by the trustees for the deferred payments were paid, and from the record it sufficiently appeared that all the purchase money was paid before the complainants in the instant suit recovered their judgments against Rorer. Held: That under the doctrine of *Floyd* v. *Harding*, 28 Gratt. (69 Va.) 401, the complainants could not subject the lot sold by Rorer to the school trustees to satisfy their judgments. McClanahan's Adm'r *v.* N. & W. Ry. Co., 705.

Jurisdiction.—See *infra*, "Deficiency in Quantity of Land."

Lien of Judgments.—See *infra*, "Judgment Liens against Vendor."

Parol Contract for Purchase of Land.—See *infra*, "Judgment Liens against Vendor."

Parol Evidence.—See *infra*, "Description of Land."

Recording Acts.—See RECORDING ACTS.

Sale by Acre or in Gross.—See *infra*, "Deficiency in Quantity of Land."

Schools.—See SCHOOLS.

Sufficiency of Description of Land.—See SPECIFIC PERFORMANCE.

VENUE.

Change of Venue.—*Impartial Jury Secured.*—The trial court must be allowed a wide discretion in deciding motions for change of venue or for a jury from another county; and, moreover, where the motion is based on the ground that an impartial jury cannot be obtained in the county, the fact that an impartial jury has subsequently been secured therein is conclusive proof that the motion was without foundation. Taylor *v.* Commonwealth, 886.

Judicial Notice.—In the instant case it was contended that the Commonwealth failed to prove that the offense was committed in Giles county, as charged. The evidence showed that the stable from which the horse was taken was at New-

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VENUE—Continued.

Judicial Notice—Continued.

port, and it appeared from an act of the General Assembly of Virginia that the village known as the town of Newport, in the county of Giles, was incorporated under that name. As the Supreme Court of Appeals will take judicial notice of charters of municipal corporations, the evidence was sufficient to show that the offense was committed in Giles county. Webb *v.* Commonwealth, 899.

Jury from Another County.—See *infra*, "Change of Venue."

Real Estate Brokers.—See REAL ESTATE BROKERS.

VERDICT.

Contrary to Law and Evidence.—See NEW TRIALS.

New Trials.—See NEW TRIALS.

VIEW BY JURY. See JURY.

VOLUNTARY CONVEYANCES. See FRAUDULENT AND VOLUNTARY CONVEYANCES.

WATERS AND WATERCOURSES.

Damages.—In a suit by a mill owner against a railroad for damages for diminution of his water power, the case stood in all essential particulars, so far as the measure of damages was concerned, as a proceeding to condemn the water for the use of the defendant, and the measure of damages is the difference between the market value of the mill property before and after the injury. The damages should not be based on the evidence of the amount of the horse-power lost, and an estimate of the value of that horse-power at the mill by comparing the horse-power at another place, and under different conditions, and a calculation of what sum put at interest at six per cent. would produce an income equivalent to that loss. Norfolk & W. R. Co. *v.* Allen, 603.

Damage to Mill Owner by Diminution of His Water Power.—Norfolk & W. R. Co. *v.* Allen, 603.

Diminution of Water Power.—See *infra*, "Exemplary Damages."

Duty to Minimize Damages.—Norfolk & W. R. Co. *v.* Allen, 603.

Measure of Damages in Suit by Mill Owner against Railroad.—Norfolk & W. R. Co. *v.* Allen, 603.

Railroad Company Intending to Exercise Right of Eminent Domain.—Norfolk & W. R. Co. *v.* Allen, 603.

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WATERS AND WATERCOURSES—Continued.

Drainage.—See *infra*, "Mandamus."

Evidence.—See *infra*, "Malaria."

Exemplary Damages.—In the case at bar the defendant railroad company continued the diminution of plaintiffs' water supply, after a judgment for plaintiffs was affirmed by the Supreme Court of Appeals. The evidence in the case, however, did not show that the railroad company was actuated by malice, wantonness or oppression, or that there was any fraud on its part, or that it was guilty of any gross negligence or recklessness, or that its action in continuing to take the water, after the order of the Supreme Court of Appeals had been certified to the circuit court, until arrangements were made to settle the controversy, evinced any intention on the part of the railroad company to disregard the rights of the plaintiffs, or to defy the law of the land. Unless one or the other of these situations existed, the plaintiffs had no right to recover punitive damages. Norfolk & W. R. Co. *v.* Allen, 603.

Malaria.—In an action for damages against a railroad company caused by the illness of plaintiff and family from malaria, which plaintiff alleged was occasioned by mosquitoes bred in stagnant water in an old canal bed, which by an act of Assembly it was the duty of defendant railroad to drain, the evidence for the plaintiff did not go beyond proving by a preponderance of it, that the water in the canal bed was the most favorable place for the production of mosquitoes. It also appeared from the plaintiff's evidence that the water in other places near by was favorable for the production of a sufficient number of mosquitoes to have caused the malaria complained of. There was no evidence to show that the one breeding place was more probable than the other of the mosquitoes which caused the malaria complained of, except the fact that more mosquitoes were probably bred in the water in the canal bed than in the water in the other places. Held: That a verdict for plaintiff upon this evidence must be set aside and annulled and a new trial granted. Ches. & O. R. Co. *v.* Catlett, 232.

Mandamus.—By an act of Assembly it was the duty of defendant railroad to drain an old canal bed, so as not to leave stagnant water by which the health of the citizens along the line of the canal might be injuriously affected. Held: That the discharge of the duty in question could be fully enforced, if need be, by the appropriate remedy of mandamus. Ches. & O. R. Co. *v.* Catlett, 232.

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WATERS AND WATERCOURSES—Continued.

Mitigation of Damages.—See DAMAGES.

Mosquitoes.—See *infra*, "Malaria."

WILLS.

Advancements.—See ADVANCEMENTS.

Conflict of Laws.—See *infra*, "Construction."

Construction.—See *infra*, "Intention."

Conflict of Laws.—The law of a testator's domicile applies in construing his will as to personality, but where a farm in Virginia is disposed of by a will, the will as to that farm must be construed with reference to the law of Virginia since the tax *situs* governs. Smith *v.* Smith, 341.

Technical Words.—See *infra*, "Technical Words."

Contest.—See *infra*, "Costs."

Costs.—Where the executor named in the supposed testamentary paper, in the performance of his duty, offers it for probate, his costs are taxed against the estate. Bowen's Ex'or *v.* Bowen, 1.

Where in the contest of a will it appeared that the beneficiary was the active litigant, seeking probate of the will, the contest being one between him as a beneficiary on the one hand, and the heirs at law of the decedent on the other, if the heirs at law prevail they may properly be awarded their costs against their adversary. Bowen's Ex'or *v.* Bowen, 1.

Declarations and Admissions.—Upon the trial of a cause involving the genuineness of a will, the contestants of the will offered a witness to prove certain declarations of the testatrix made subsequent to the date of the alleged will, accompanying the offer with an avowal by counsel that he expected to show by the witness that from the declarations of the testatrix, that the testatrix "could not have known of this will." The record did not show what the alleged declarations of the testatrix were, therefore the Supreme Court of Appeals must assume from the avowal that they were such as would have tended to show that the testatrix could not have known of the will. Samuel *v.* Hunter's Ex'x, 636.

In a contest over the genuineness of a will, the declarations of the testatrix, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will; but in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as

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WILLS—Continued.

Declarations and Admissions—Continued.

circumstances, either to strengthen or to weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will. Samuel *v.* Hunter's Ex'x, 636.

Devise with Absolute Power of Disposal.—A testator gave and devised all his estate to his wife for and during her natural life, "to be used and enjoyed by her as she shall think proper as fully as if the same were hers in fee simple," and then he expressly added that "no interest or estate shall vest in any child or the descendants of any, until the death of my wife." Held: That, having denied the children in express terms any interest or estate in the property in the lifetime of his wife, this must have been because he intended his wife should have absolute control and dominion during her life; and, therefore, the wife took a fee simple. Smith *v.* Smith, 341.

Domicile.—Although a testator died in Baltimore, Maryland, and through the necessity of his business was a resident of that city, yet it was held from his purchase of a farm in Virginia, and his relation to it, and from other evidence, that his domicile was in Virginia. Smith *v.* Smith, 341.

Estates.—See *infra*, "Devise with Absolute Power of Disposal."

Evidence.—See *infra*, "Declarations and Admissions."

Executors and Administrators.—See EXECUTORS AND ADMINISTRATORS.

Fee Simple.—See *infra*, "Devise with Absolute Power of Disposal."

Genuineness.—See *infra*, "Declarations and Admissions."

Intention.—Intention, it is often said, is the polar star to guide in the construction of wills, and when discovered effect must be given to it unless it violates some rule of law. The intent of the testator must be gathered from the will itself; from the words used, the true meaning of the words. While decided cases give much assistance in the interpretation of wills, it is also fairly true as has been said, that "No will has a twin brother;" therefore, it frequently happens, as in the instant case, that no decided case is exactly in point, the words of the will differing, though slightly, in each case. Smith *v.* Smith, 341.

Interpretation and Construction.—See *infra*, "Construction."

Jus Disponendi.—See *infra*, "Devise with Absolute Power of Disposal."

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WILLS—Continued.

Probate.—The probate of a will is not evidence in a collateral proceeding of the domicile of the testator, and other tribunals are not precluded from inquiring into the real domicile. The full faith and credit due to the proceedings of a sister State do not require that the courts of a State shall be bound by its adjudication on the question of domicile. In the trial of a collateral issue, it is open to the courts of any State, to determine, upon the evidence produced, the true domicile of the deceased. Smith *v.* Smith, 341.

Technical Words.—A technical word in a will should be given its technical meaning. Smith *v.* Smith, 341.

WITNESSES.

Argument of Counsel.—See *infra*, "Impeachment."

Conduct of Counsel.—In cross-examining a witness defendant's counsel said: "I know, Mr. Turner, this situation myself, and there are others who know it, and I want to ask you to see if we coincide." Held: That this could not have prejudiced the plaintiff. Abernathy *v.* Emporia Mfg Co., 406.

Cross-Examination.—See *infra*, "Impeachment."

Examination.—See *infra*, "Leading Question."
Conduct of Counsel.—See *infra*, "Conduct of Counsel."

Impeachment.—It is competent, in order to discredit a witness, to offer evidence attacking his character for truth and veracity. Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose. No question respecting any fact irrelevant to the issue can be put to a witness on cross-examination for the mere purpose of impeaching his credit by contradicting him. And if any such question be inadvertently put and answered, the answer of the witness will be conclusive. Allen *v.* Commonwealth, 834.

In a trial for the larceny of a check given by an insurance company in settlement of a policy, accused claimed to have paid the proceeds of the check to an undertaker for burial expenses of the assured. The undertaker testified that although the cost of burial was only $23.50, nevertheless, at the request of the accused, he made out and receipted a bill to him for $71.50, for such burial. Attorney for the accused then asked the undertaker if it was not a fact that when his buggy had been damaged by another and the bill for its repair was $6.00, he had not asked the person repairing the buggy to raise it to $12.00, and collected the $12.00 for damages.

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WITNESSES—Continued.

Impeachment—Continued.

Held: That there was no error in sustaining the Commonwealth's objection to this last question. Allen *v.* Commonwealth, 834.

The test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether or not the cross-examining party would be entitled to prove it in support of his case. Allen *v.* Commonwealth, 834.

Argument of Counsel.—Rebecca Harris, the mother of accused, was introduced as a witness by the Commonwealth to prove the homicide; but her testimony on cross-examination strongly tended to sustain the theory of the accused that he shot the deceased in defense of his mother. The Commonwealth was not altogether dependent upon the testimony of this witness to prove that the homicide was committed by the accused. Nevertheless, the attorney for the Commonwealth, in arguing his right to introduce evidence to contradict certain statements made by Rebecca Harris, asserted that "the Commonwealth would not be bound by the evidence of Rebecca Harris * * * if she told a pack of lies;" and also referred to her as "a person I consider a criminal, and probably ought to have been indicted." These remarks were excepted to by the prisoner but the exception was not sustained by the court, nor was the jury admonished that they were improper, and should not influence them in arriving at their verdict. Held: That the statements made by the prosecuting officer in the circumstances mentioned constituted reversible error. Green *v.* Commonwealth, 862.

It is difficult, at best, to disabuse the mind of the jury of derogatory statements of counsel made in respect to the character of a witness, even where the court instructs them on the subject, but the ill consequences are immeasurably increased when the objectionable language goes unrebuked. Section 3351 of the Code of 1904 declares that a party introducing a witness shall not be allowed to impeach his credit by general evidence of bad character; but, if in the opinion of the court, the witness proves adverse, he may contradict him by other evidence showing that at other times he had made statements inconsistent with his present testimony. Yet this contradicting evidence must be introduced by leave of court and after the witness has been fully put on guard with respect to it. If, therefore, a witness so introduced cannot be impeached by general evidence of his bad character, *a fortiori* he should not be discredited before the jury by opinions of the prosecuting attorney with respect to his character. Green *v.* Commonwealth, 862.

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WITNESSES—Continued.

Impeachment—Continued.

Inconsistent Statements.—It was error to admit evidence of a prior consistent statement of a witness who had testified to a material fact in the case, where it was not shown whether the contradictory statement of the witness was made before or after the consistent statement, nor was the date fixed when the witness was alleged to have offered to sell his testimony to the plaintiff. The testimony in the instant case does not bring the statement within the rule which permits evidence of a prior consistent statment before the time when the supposed bias or corruption could have existed, in order to repel the presumption that the present testimony was attributable to such bias or corruption. Abernathy *v.* Emporia Mfg. Co., 406.

Independent Facts.—See *infra*, "Impeachment."

Leading Question.—Great latitude is allowed trial courts in the matter of the examination of witnesses and their rulings thereon will not be reversed unless clearly prejudicial to the party excepting. Ordinarily, permitting a leading question to be asked is no ground for reversal. Abernathy *v.* Emporia Mfg. Co., 406.

WORDS AND PHRASES.

Apparatus.—Va. L. Etc. Co. *v.* O. D. McHenry L. Co., 111.

Benevolent Object of a Public Character.—Pirkey *v.* Grubb's Ex'or, 91.

"Business."—Derrick *v.* Commonwealth, 906.

"Curtilage."—Bare *v.* Commonwealth, 783.

Donation.—Pirkey *v.* Grubb's Ex'or, 91.

"Dwelling."—Bare *v.* Commonwealth, 783.

Engaged in Business.—Derrick *v.* Commonwealth, 906.

"Estate."—*Meaning of the Term as Used in Section 2263, Code of 1904.*—Gum *v.* Gum, 32.

"Home."—Bare *v.* Commonwealth, 783.

"Keep."—Lane *v.* Commonwealth, 916.

"Month."—Cochran *v.* Commonwealth, 801.

Own Business.—Derrick *v.* Commonwealth, 906.

"Permanent Residence."—Bare *v.* Commonwealth, 783.

Place of Business.—Builders Supply Co. *v.* Piedmont L. Co., 225.

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